United Nations

Report of the United Nations Commission on International Trade Law

Thirty-third session (12 June-7 July 2000)

General Assembly
Official Records
Fifty-fifth session
Supplement No. 17 (A/55/17)

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Note

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I. Introduction

1. The present report of the United Nations Commission on International Trade Law covers the Commission's thirty-third session, held in New York from 12 June to 7 July 2000.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

II. Organization of the session

A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its thirty-third session on 12 June 2000. The Under-Secretary-General for Legal Affairs, the Legal Counsel, opened the session.

B. Membership and attendance

4. The General Assembly, by its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. The current members of the Commission, elected on 28 November 1994 and on 24 November 1997, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated: Algeria (2001), Argentina (2004—alternating annually with Uruguay, starting 1998), Australia (2001), Austria (2004), Botswana (2001), Brazil (2001), Bulgaria (2001), Burkina Faso (2004), Cameroon (2001), China (2001), Colombia (2004), Egypt (2001), Fiji (2004), Finland (2001), France (2001), Germany (2001), Honduras (2004), Hungary (2004), India (2004), Iran (Islamic Republic of) (2004), Italy (2004), Japan (2001), Kenya (2004), Lithuania (2004), Mexico (2001), Nigeria (2001), Paraguay (2004), Romania (2004), Russian Federation (2001), Singapore (2001), Spain (2004), Sudan (2004), Thailand (2004), Uganda (2004), United Kingdom of Great Britain and Northern Ireland (2001) and United States of America (2004).

5. With the exception of Kenya and Uganda, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Angola, Bangladesh, Belarus, Bolivia, Canada, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Holy See, Indonesia, Ireland, Israel, Kuwait, Morocco, Myanmar, Peru, Philippines, Poland, Portugal, Republic of Korea, Saudi Arabia, Sweden, Switzerland and Venezuela.

7. The session was also attended by observers from the following international organizations:

(a) **United Nations system**

Economic Commission for Europe

World Bank

International Monetary Fund

(b) **Intergovernmental organizations**

Asian Clearing Union

Asian Development Bank

East African Cooperation Secretariat

European Union

Hague Conference on Private International Law

Inter-American Development Bank

International Institute for the Unification of Private Law

(c) **International non-governmental organizations invited by the Commission**

Arab Association for International Arbitration

Arab Society of Certified Accountants

Association of the Bar of the City of New York

Cairo Regional Centre for International Commercial Arbitration

Chartered Institute of Arbitrators

Commercial Finance Association

Council of Legal Education

Europafactoring

European Banking Federation

European Lawyers' Union

Factors Chain International

Financial Markets Lawyers Group

Group of Thirty

International Association of Lawyers

International Association of Ports and Harbours

International Bar Association

International Chamber of Commerce

International Council for Commercial Arbitration

International Federation of Commercial Arbitration Institutions

International Federation of Insolvency Professionals (INSOL International)

International Maritime Committee

International Swaps and Derivatives Association

International Women's Insolvency and Restructuring Confederation

Latin American Group of Lawyers for International Trade Law

University of the West Indies

World Association of Former United Nations Interns and Fellows

8. The Commission was appreciative of the fact that international non-governmental organizations that had expertise regarding the major items on the agenda of the current session had accepted the invitation to take part in the meetings. Being aware that it was crucial for the quality of texts formulated by the Commission that relevant non-governmental organizations should participate in the sessions of the Commission and its working groups, the Commission requested the Secretariat to continue to invite such organizations to its sessions based on their particular qualifications.

C. Election of officers

9. The Commission elected the following officers:

Chairman: Jeffrey Chan Wah Teck (Singapore)

Vice-Chairmen: Aly Gamledin Awad (Egypt)
Jorge Roberto Maradiaga (Honduras)
Victoria Gavrilescu (Romania)

Rapporteur: David Moran Bovio (Spain)

D. Agenda

10. The agenda of the session, as adopted by the Commission at its 676th meeting, on 12 June 2000, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Draft convention on assignment of receivables.
5. Draft legislative guide on privately financed infrastructure projects.
6. Electronic commerce.
7. Insolvency.
8. Settlement of commercial disputes.
9. Monitoring implementation of the 1958 New York Convention.
10. Case law on UNCITRAL texts (CLOUT).
11. Transport law: progress report on the gathering of information.

12. Endorsement of texts of other organizations: Incoterms 2000, ISP98, URCB.

13. Training and technical assistance.

14. Status and promotion of UNCITRAL legal texts.

15. General Assembly resolutions on the work of the Commission.

16. Coordination and cooperation.

17. Other business.

18. Date and place of future meetings.

19. Adoption of the report of the Commission.

E. Adoption of the report

11. At its 710th meeting, on 7 July 2000, the Commission adopted the present report by consensus.

III. Draft Convention on assignment of receivables

A. Title and preamble

12. The Commission decided to postpone discussion of the title and the preamble until it had had a chance to consider the scope of the draft convention (see paras. 181-183).

B. Consideration of draft articles

Chapter I. Scope of application

Article 1. Scope of application

13. The text of draft article 1 as considered by the Commission was as follows:

"1. This Convention applies to:

"(a) Assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of the conclusion of the contract of assignment, the assignor is located in a Contracting State;

"(b) Subsequent assignments provided that any prior assignment is governed by this Convention; and

"(c) Subsequent assignments that are governed by this Convention under subparagraph (a) of this paragraph, notwithstanding that any prior assignment is not governed by this Convention.

"2. This Convention does not affect the rights and obligations of the debtor unless the debtor is located in a Contracting State or the law governing the receivable is the law of a Contracting State.

"[3. The provisions of chapter V apply to assignments of international receivables and to international assignments of receivables as defined in this chapter independently of paragraphs 1 and 2 of this article. However, those provisions do not apply if a State makes a declaration under article 37.]

"4. The annex to this Convention applies in a Contracting State which has made a declaration under article 40."

Paragraph 1

14. The suggestion was made that subparagraph (b) should be revised to require for a subsequent assignment, as subparagraph (a) did for an initial assignment, that the assignor be located in a contracting State. It was stated that, unless the assignor in a subsequent assignment was located in a contracting State, the rules of the convention could not apply to a dispute with a third party arising in the assignor's location; and the convention could inadvertently apply to an assignment even if the assignor, the assignee and the debtor were located in a non-contracting State. The suggestion was objected to. It was observed that such an approach would be inconsistent with the principle of *continuatio juris*, which was reflected in

subparagraph (a) and under which, if the initial assignment was covered by the convention, any subsequent assignment would also be covered.

15. While some concern was expressed that subparagraph (c) might be inconsistent with the principle of *continuatio juris* reflected in subparagraph (b), it was widely felt that it appropriately provided that the convention applied to a subsequent assignment, which met the conditions of subparagraph (a). In that connection, the view was expressed that the assignment addressed in subparagraph (c) was not really a third type of assignment, as suggested by the present wording, but rather a negation of a possible limitation that might otherwise apply with respect to assignments meeting the requirements of subparagraph (a). It was, therefore, suggested that subparagraph (c) should be recast as a new paragraph 2 to read: "This Convention applies to a subsequent assignment that is described in paragraph 1 (a) of this article notwithstanding that this Convention did not apply to any prior assignment of the same receivable". Subject to that change, the Commission approved the substance of paragraph 1 and referred it to the drafting group.

Paragraph 2

16. It was noted that, in order to enhance certainty with respect to the application of the convention, paragraph 2 should specify the time when the debtor needed to be located in a contracting State or a receivable needed to be governed by the law of a contracting State for the debtor-related provisions of the convention to apply. It was also noted that reference to the time of the conclusion of the original contract would be preferable from a debtor protection point of view, since the debtor could determine at the time it undertook the original obligation whether the convention would affect its legal position. It was also noted, however, that such an approach would inadvertently result in the assignor, the assignee and other third parties being unable to determine at the time of the assignment of a future receivable whether the convention would apply to the rights and obligations of the debtor. Despite that difficulty, which also arose in article 3 with respect to the determination of the internationality of a future receivable, the Commission decided that paragraph 2 should be revised to provide that the debtor should be located in a contracting State or the receivable should be governed by the law of a contracting State at the time of the conclusion of the original contract. The Commission approved the substance of paragraph 2 and referred the matter to the drafting group.

Paragraphs 3 and 4

17. The Commission decided to defer discussion of paragraph 3, which dealt with the scope of the private international law provisions contained in chapter V, until it had had a chance to consider chapter V. The Commission also decided that paragraph 4, which dealt with the application of the annex, should be considered at a later stage in the context of the discussion of article 40 and the annex.

Article 2. Assignment of receivables

18. The text of draft article 2 as considered by the Commission was as follows:

"For the purposes of this Convention:

"(a) 'Assignment' means the transfer by agreement from one person ('assignor') to another person ('assignee') of the assignor's contractual right to

payment of a monetary sum ("receivable") from a third person ("the debtor"). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer.

"(b) In the case of an assignment by the initial or any other assignee ("subsequent assignment"), the person who makes that assignment is the assignor and the person to whom that assignment is made is the assignee."

Non-contractual receivables

19. Concern was expressed that, by referring to contractual receivables, subparagraph (a) was unnecessarily restrictive. It was pointed out that the assignment of non-contractual receivables, such as payment rights under tax reimbursement claims, was part of important financing practices that the draft convention should cover. Furthermore, it was said that a broader definition of receivables might avoid the difficulties that resulted from the varying interpretation given in different legal systems to the term "contractual rights". In order to address that concern, the suggestion was made that subparagraph (a) should be revised to refer to non-contractual receivables or that, at least, States should be given an option to apply the convention to assignments of non-contractual receivables. The suggestion was objected to. It was pointed out that the draft convention had been prepared with contractual receivables in mind and that some of its provisions (e.g. provisions as to the defences and rights of set-off and as to the location of the debtor) might be ill-suited for non-contractual receivables. An effort to cover the assignment of non-contractual receivables would, therefore, require a careful review and adjustment of a number of provisions of the draft convention, which was considered non-productive at that late stage of the deliberations. After discussion, the Commission confirmed the decision of the Working Group on International Contract Practices to limit the scope of application of the convention to contractual receivables.

Parts of and undivided interests in receivables

20. The Commission noted that, while article 9 expressly validated partial assignments, partial assignments were not explicitly referred to in subparagraph (a) and that, as a result, uncertainty might arise as to whether the convention as a whole applied to partial assignments. In particular, it was noted that uncertainty might arise with regard to the legal position of the debtor in the case of a partial assignment (e.g. whether the debtor would be obliged to pay the assignee or the assignor). In view of the fact that partial assignments were involved in significant financing practices, the Commission decided that the matter should be explicitly addressed in subparagraph (a) and referred the matter to the drafting group. In the discussion, it was suggested that another possible approach to the problem might be to confine article 11 to assignments of whole receivables. The Commission postponed discussion of the legal position of the debtor in the case of a partial assignment until it had a chance to consider the debtor-related provisions of the draft convention (see paras. 173, 180 and 185).

21. The Commission noted that article 9 validated not only partial assignments of receivables, but also assignments of undivided interests in receivables. It was generally agreed that appropriate reference to assignments of undivided interests in receivables should also be made in article 2 so as to make it clear that the convention as a whole was also applicable to such assignments.

Non-monetary performance rights

22. The Commission decided that the assignment of non-monetary performance rights arising out of the original contract (such as the right to performance, the right to declare the contract avoided) should not be covered by the convention. It was agreed that assignments of such non-monetary performance rights were not frequent in practice and that, therefore, their inclusion in the scope of the convention was not necessary. It was also pointed out that the draft convention had been prepared essentially with assignment of monetary rights in mind and that the inclusion of other performance rights might require adjustments in various provisions. Furthermore, it was felt that, while the transfer of security or supporting rights related to the receivable was appropriately addressed in the draft convention (see article 12), other rights, such as the right to terminate a contract, might be regarded as eminently personal rights that should not be automatically transferred to the assignee with the receivable.

Statutory assignability

23. The Commission noted that assignments of receivables that were not assignable by law (other than those addressed in article 9) were not intended to be covered by the draft convention and considered the question whether that understanding should be explicitly expressed in article 2. Noting that the matter related to the effectiveness of the assignment, rather than to the scope of the convention, the Commission decided that it should be considered in connection with article 9 (see para. 131).

Unilateral assignments

24. The Commission decided that unilateral assignments (i.e. assignments made but not yet accepted by the assignee) should not be addressed in the draft convention. It was widely felt that such assignments were rare in practice and that, therefore, there was no need to address them in the draft convention.

Article 3. Internationality

25. The text of draft article 3 as considered by the Commission was as follows:

> "A receivable is international if, at the time of the conclusion of the original contract, the assignor and the debtor are located in different States. An assignment is international if, at the time of the conclusion of the contract of assignment, the assignor and the assignee are located in different States."

26. The Commission approved the substance of article 3 and referred it to the drafting group.

Article 4. *Exclusions*

27. The text of draft article 4 as considered by the Commission was as follows:

> "1. This Convention does not apply to assignments:
>
> "(a) Made to an individual for his or her personal, family or household purposes;
>
> "(b) To the extent made by the delivery of a negotiable instrument, with any necessary endorsement;

"(c) Made as part of the sale, or change in the ownership or the legal status, of the business out of which the assigned receivables arose.

"[2. This Convention does not apply to assignments listed in a declaration made under article 39 by the State in which the assignor is located, or with respect to the provisions of this Convention which deal with the rights and obligations of the debtor, by the State in which the debtor is located.]"

Paragraph 1 (a)

28. It was noted that the convention was intended to cover assignments of commercial or consumer receivables for commercial purposes, but not assignments for consumer purposes (irrespective of whether the receivables were commercial or non-commercial). With that understanding, the Commission approved the substance of subparagraph (a) and referred it to the drafting group.

Paragraph 1 (b)

29. It was noted that subparagraph (b) was intended to exclude from the scope of the convention transfers of negotiable instruments, whether made by mere delivery or by delivery and endorsement. It was also noted that, when a receivable served as a basis for issuing a negotiable instrument and then both the negotiable instrument and the claim were transferred, the transfer of the negotiable instrument was not covered by the draft convention while the transfer of the receivable by way of an assignment was to be covered. In that connection, a suggestion was made to delete in subparagraph (b) the expression "with any necessary endorsement" as it might lead to a misunderstanding that a transfer of a negotiable instrument by mere delivery was not excluded. The Commission approved the substance of subparagraph (b) and referred it to the drafting group.

30. The question was raised whether subparagraph (b) should exclude from the scope of application of the convention also transfers of dematerialized (i.e. electronic) securities held by an intermediary. The Commission took note of the question and decided to discuss it subsequently in the context of the broader discussion of the types of transaction to be included in or excluded from the scope of the convention (see para. 72). In addition, it was noted that dematerialized securities might call for special treatment as regards the law applicable to competing rights (article 24). It was also noted that the matter might be considered by the Hague Conference on Private International Law and, therefore, coordination and cooperation with the Hague Conference might become necessary (see paras. 177, 178 and 460).

Paragraph 1 (c)

31. The Commission approved the substance of subparagraph (c) and referred it to the drafting group.

Paragraph 2

32. It was noted that paragraph 2, allowing States to exclude further practices, appeared within square brackets pending final determination of the scope of the convention. The Commission postponed consideration of paragraph 2 until it had reached a final decision on the scope of the convention (see paras. 109 and 152).

Article 5. Limitations on [assignments of] receivables other than trade receivables

33. The text of draft article 5 as considered by the Commission was as follows:

"[*Variant A*

"1. Articles 17, 18, 19, 20 and 22 do not affect the rights and obligations of the debtor in respect of a receivable other than a trade receivable except to the extent the debtor consents.

"2. Notwithstanding articles 11, paragraph 2, and 12, paragraph 3, an assignor who assigns a receivable other than a trade receivable is not liable to the debtor for breach of a limitation on assignment described in articles 11, paragraph 1, and 12, paragraph 2, and the breach shall have no effect.

"*Variant B*

"Articles 11 and 12 and section II of chapter IV apply only to assignments of trade receivables. With respect to assignments of receivables other than trade receivables, the matters addressed by these articles are to be settled in conformity with the law applicable by virtue of the rules of private international law.]"

34. While some support was expressed in favour of variant A, it was widely felt that an approach along the lines of variant B would be preferable since it would result in protecting the debtor more fully than variant A. It was stated that, if the assignment were to be effective as between the assignor and the assignee, as provided under variant A, the legal position of the debtor could, in certain legal systems, be negatively affected. The discussion focused on a revised version of variant B, as follows (see A/CN.9/472/Add.1, page 11):

"Unless the debtor consents, articles 11 and 12 apply only to assignments of trade receivables. With respect to assignments of receivables other than trade receivables, the matters addressed by these articles are to be settled in conformity with the law applicable by virtue of the rules of private international law."

35. This revised version of variant B was supplemented by the following definitions (see A/CN.9/472/Add.1, page 12):

"'Trade receivable' means a receivable arising under an original contract for the sale or lease of goods or the provision of services other than receivables arising under payments or securities settlement systems and receivables arising under financial contracts governed by netting agreements or used as collateral.

"'Payment or securities settlement system' means any contractual arrangement between three or more participants with common rules for the settlement of payment or security transfer orders, and of any related collateral, between the participants, whether or not supported by a central counter-party, settlement agent or clearing house.

"'Financial contract' means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending

transaction, any deposit transaction and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above, and any collateral or credit support related to any transaction referred to above.

"'Netting agreement' means an agreement which provides for one or more of the following:

"(a) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;

"(b) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; and

"(c) The set-off of amounts calculated as contemplated by the preceding phrase (b) under two or more netting agreements."

36. Comparing the original and the revised version of variant B, general preference was expressed for the revised version. It was observed that the original version of variant B was unnecessarily broad in that it would inadvertently result in excluding from the scope of the convention the assignment of all receivables other than trade receivables. Unlike the original version of variant B, the revised version called for a more limited exclusion, since it referred only to articles 11 and 12, only for receivables from payment systems or financial netting agreements and only if the debtor did not consent to the assignment.

37. With regard to the particular formulation of the revised version of variant B, a number of views were expressed. One view was that the reference to consent by the debtor was meaningless, since anti-assignment clauses were routinely included in netting arrangements. Another view was that the reference to private international law might create uncertainty and should be deleted. In response, it was pointed out that, even if that reference were to be deleted, the result would be the same. As regards the definition of "trade receivable", it was observed that receivables from construction works should also be treated as trade receivables. It was also stated that it might be better to avoid defining "trade receivable" since the term was not universally understood in the same way (for remarks on the other definitions, see paras. 49-51).

38. While it was agreed that the revised version of variant B was more appropriate than variant A and the original version of variant B, the view was expressed that even the revised version of variant B did not go far enough in protecting the rights of debtors, for example, in financial netting agreements, since it relied on the existence of an anti-assignment clause and on the effect given to that clause by the law applicable outside the draft convention. It was stated that, if the applicable law recognized the validity of an assignment made in violation of an anti-assignment clause, the assignment would be effective and could fall within the ambit of the convention. As a result, for example, netting arrangements might be disrupted (e.g. because netting could be exercised by means other than set-off and, therefore, article 19 might not be sufficient in preserving netting rights). To the extent that the debtor would have a right of set-off and would be considered to be also a creditor, in the case of a conflict of priority, article 24 could apply and refer priority issues to

the law of the assignor's location rather than, for example, to the more appropriate law of the location of the investment securities account. It was stated that consultation with the industry had led to the result that certain financial practices should be excluded from the scope of application of the convention altogether. In the place of article 5, language along the following lines was proposed for inclusion in articles 6 and 4:

"*Article 6*

"*Definitions and rules of interpretation*

"(x) (i) Except as provided in subparagraph (ii), a receivable is a contractual right to payment of a monetary sum, owed by a person (debtor) to an assignor, as:

"(a) Payment for goods sold or leased or for the provision of services [other than financial services];

"(b) Payment for industrial or other intellectual property sold or licensed;

"(c) Payment for a credit card transaction;

"(d) Repayment of a loan of money, regardless of the currency in which denominated; or

"(e) Reimbursement for the payment, pursuant to a guaranty, suretyship obligation [or other secondary obligation] of the debtor's obligation to a third party.

"(x) (ii) The following are not 'receivables':

"(a) Rights to payment arising from transactions on a regulated futures exchange;

"(b) Rights to payment arising from the sale, lease or loan of gold or other precious metals;

"(c) Rights to payment under a financial netting agreement;

"(d) Rights to payment under bank deposit relationships, including those arising under inter-bank payment systems;

"(e) Rights to payment from an insurer under an insurance contract, or from a reinsurer under a reinsurance contract;

"(f) Rights to payment for goods sold or leased to the extent that under the law of the State where the goods are located the goods are considered to be part of the real estate on which the goods are situated;

"(g) Drawing rights or rights to payment under a letter of credit or independent bank guarantee;

"(h) Rights to payment arising from foreign exchange contracts; or

"(i) Rights to payment arising from the sale or lending of investment securities, including repurchase agreements and rights to payment arising under investment securities settlement systems."

"*Article 4*

"*Exclusions and limitations on application of certain provisions*

"3. In the case of receivables described in subparagraphs (d) and (e) of article 6 (x) (i), articles 11 and 12 do not affect the rights and obligations of the debtor [or any guarantor, surety or other secondary obligor for the debtor] unless the debtor [or such guarantor, surety, or secondary obligor] otherwise consents."

39. The purpose of the proposal, it was explained, was essentially to refine the scope of application of the convention with a view to ensuring that it did not inadvertently disrupt certain financial practices for which not all provisions of the convention were well suited. It was observed that the proposal was based on a distinction between three categories of receivables, those to which all of the provisions of the convention would apply, those to which only some provisions would apply and those which would be excluded from the scope of application of the convention altogether. Moreover, it was explained that the list of exclusions was necessary since, even with an enumeration of practices covered, the convention could inadvertently apply to practices that were well regulated and that could even be disrupted if the convention were to apply.

40. There was general agreement in the Commission that certain practices needed to be treated differently. Differing views were expressed, however, as to whether those practices should be excluded from the scope of the convention as a whole or from the scope of articles 11 and 12 only. One view was that, if articles 11 and 12 did not apply, the effectiveness of assignments made despite anti-assignment clauses would be left to law applicable outside the convention. As a result, in most cases, the assignment would be ineffective and the convention would not apply. It was also stated that, while an approach based on lists would have the same result, it could not be preferred because it raised a number of problems. One problem was that an approach based on lists, rather than on a general rule, would run the risk of being incomplete or inconsistent and thus raise questions of interpretation. Another problem was that a list could soon become outdated, since international practice evolved rapidly and new types of receivables might develop that might not fit well into any of the categories listed in the proposal. In that event, questions would arise as to whether those new types of receivables would fall within or outside the scope of the convention. Yet another problem was that any list might inadvertently exclude new practices with regard to trade receivables, thus hampering their further development. Still another problem was that the lateness of the proposal did not allow delegates time for consultations with representatives of the relevant sectors of the industry, which became necessary as a result of the radical nature of the proposal.

41. Another view was that a qualified approach, such as the one mentioned above (see paras. 38 and 39), should be followed. Such an approach would enhance certainty in the application of the convention and increase the level of its acceptability to States and the relevant industry. It was stated that, for the reasons mentioned above (see para. 38), excluding certain practices from the scope of articles 11 and 12 only would not be sufficient to avoid undue interference with well-regulated and efficiently functioning practices. That result was said to be contrary to the main goal of the convention, which was to increase the availability of lower-cost credit. In addition, it was stated that the proposal did not raise a new

issue, since the exact scope of the convention had been left open by the Working Group.

42. After discussion, the Commission postponed reaching a decision as to the proposed approach until it had completed its consideration of the practices listed in the proposal (see paras. 97-100). In order to accommodate some of the concerns expressed, the Commission agreed that the definition of "receivable" by way of a list of practices could, for the time being, be left aside. The Commission went on to consider in more detail the practices suggested to be excluded.

Subparagraph (a) (Payment rights from regulated futures exchanges)

43. It was stated that the reference to rights to payment arising from transactions on a regulated futures exchange was essentially intended to cover exchange trading of derivatives and commodities, which was well regulated and functioning under national law. In addition, it was observed that application of the convention to such practices could frustrate the legitimate expectations of parties and seriously disrupt existing markets. The suggestion was made that, for the same reasons, all exchange trading should be excluded. It was stated that such an approach would render any specific reference to exchange trading in precious metals and to foreign currency exchange trading unnecessary. In order to address the points made in the discussion, the proposal was reformulated as follows: "[rights to payment] [receivables] arising from transactions on a regulated exchange". It was observed that the bracketed language was being used pending determination by the Commission whether such an exclusionary approach would be followed and, if so, whether the list of exclusions would be made part of article 2 or article 4. In response to a question, it was stated that the reference to "exchange" was intended to encompass transactions made under the auspices of a regulated exchange (e.g. stock exchange, securities and commodities exchange) and not every regulated market.

Subparagraph (b) (Rights to payment from the sale, lease or loan of gold or other precious metals and from foreign currency exchange transactions)

44. It was explained that the proposed exclusions were based on considerations similar to those underlying the proposed exclusion of rights to payment arising from transactions on a regulated futures exchange. They were needed because the rules of the convention (e.g. articles 11 and 12) might not be entirely compatible or might even interfere with the functioning of regulated markets. It was also explained that, while precious metals and foreign currency were traded in exchanges, trading between individuals was also a practice that should be excluded, in particular in view of the need to control the transfer of such assets to off-shore parties.

45. Various objections were raised to the proposed exclusion, which it was felt would lead to an unnecessary and unjustified limitation of the scope of application of the convention. It was considered that the essential criterion for the exclusion should be the technique used for settlement and not the nature of the assets being traded. It was added that, as currently formulated, the proposed exclusion would encompass transactions involving the factoring of proceeds of the sale of gold and other metals that took place outside any regulated exchange, such as the sale of jewellery. After deliberation, it was tentatively agreed that the proposed exclusions should be reformulated and possibly combined with trading in a regulated exchange. As a result, subparagraph (b) of the proposed text (see para. 38) could be deleted

and subparagraph (h) would relate only to foreign exchange contracts negotiated off a regulated exchange (see paras. 66-68).

Subparagraph (c) (Rights to payment under financial netting agreements)

46. The Commission generally agreed that the assignment of rights to payment under financial netting agreements should be excluded from the scope of application of the convention or of articles 11 and 12. It was widely felt that such practices functioned well under standard master agreements prevailing in practice (e.g. master netting agreements prepared by the International Swaps and Derivatives Association) and currently applicable law. In addition, it was stated that bringing the assignment of financial netting receivables into the scope of the Convention would inadvertently result in disrupting such financial netting practices, since certain provisions of the draft Convention would not work well for those practices (e.g. articles 11, 12, 19 and 24-26). Such a result was said to be contrary to the overall goal of the convention, which was to increase the availability of lower-cost credit with a view to facilitating the movement of goods and services across national borders. Moreover, it was observed that the exclusion of the application of articles 11 and 12 only would not be sufficient to protect parties to financial netting agreements, since it was based on the assumption that there would always be an anti-assignment clause and that that clause would be validated under law applicable outside the convention. In that connection, it was observed that, if an assignment was effective despite the fact that it was made in violation of an anti-assignment clause, the assignment could fall under the convention. As a result, the debtor's right to netting might be affected (article 19 referring to set-off might not cover all types of netting) and priority would be referred to the law of the assignor's location (instead of the more appropriate law of the location of the securities account).

47. With regard to the particular formulation of the exclusion of netting in financial agreements, a number of questions were raised. One question was whether payment rights arising both before and after close-out (i.e. termination) of the netting agreement were meant to be covered by the exclusion. In response, it was stated that all such rights to payment were intended to be covered. Another question was whether netting in non-financial agreements (e.g. in the airline or farming business) should also be excluded. While there was some support for the exclusion of such netting agreements, the prevailing view was that they should not be excluded, since such an approach might inadvertently result in excluding the assignment of certain trade receivables. It was suggested, however, that the application of articles 11 and 12, dealing with anti-assignment clauses, might be excluded with respect to such non-financial netting agreements. There was no sufficient support for that suggestion (for the continuation of the discussion, see para. 149).

48. The view was expressed that rights arising under inter-bank payment systems (referred to in subparagraph (d)) and rights arising from the sale or lending of investment securities or under investment securities settlement systems (referred to in subparagraph (i)) were closely related to netting agreements and should be listed together. In order to address the concerns expressed, subparagraph (c) of the proposed text (see para. 38) was reformulated as follows: "[Rights to payment] [Receivables] arising under financial contracts governed by netting agreements, except a [receivable] [right to payment] owed on the termination of all outstanding transactions". It was explained that only financial netting arrangements would be

covered, while netting between industry participants would not be excluded (but might need to be treated differently in the context of article 20 so as to ensure that rights of set-off arising from transactions governed by netting arrangements would be preserved; see, however, para. 149). It was also stated that the assignment of receivables payable upon termination of a netting arrangement was not intended to be excluded, since in such a case there was no risk that the mutuality of netting arrangements would be disturbed.

Definitions

49. Support was expressed in favour of the definition of "netting agreement" (see para. 35). At the same time, a number of concerns were expressed. One concern was that the definition was too broad and might inadvertently result in excluding bilateral agreements between traders pooling credits and debits and settling mutual obligations by way of net payments, a result that was considered inappropriate. In response, it was observed that financial netting arrangements, whether multilateral or bilateral, should be excluded from the scope of the draft Convention. Another concern was that the reference to "set-off" might be inappropriate, since there was no universal understanding of that notion. Yet another concern was that the situation described in subparagraph (b) of the definition of "netting agreement" did not involve a genuine netting arrangement and should be deleted.

50. Support was also expressed in favour of the definition of "financial contract" (see para. 35). It was suggested, however, that the reference to payment rights from deposit accounts should be deleted, since specific reference was made in the proposed list of exclusions to payment rights from deposit accounts (see para. 38 and para. (x) (ii) (d) of the proposed text). It was also suggested that the reference to collateral or credit support arrangements should be deleted, since such arrangements did not constitute a necessary element for the definition of "financial contract". It was stated, however, that collateral and credit support arrangements were an important part of financial contracts, which affected the overall cost of the financing made available and should, therefore, be explicitly mentioned either in the definition of "financial contract" or in the definition of "netting agreement". In response, it was observed that, while the importance of collateral and credit support arrangements could not be denied, they did not form part of the definition of either "netting agreement" or "financial contract". It was also stated that referring to collateral arrangements in the definitions of "financial contract" or "netting agreement" could inadvertently result in the exclusion of an assignment of receivables made by a business to secure a bank loan. It was tentatively agreed that the reference to collateral and credit support arrangements in the definition of "financial contract" should be deleted (see also para. 74).

51. The Commission also considered the definition of "payment or securities settlement system" (see para. 35). It was stated that it was important to clarify that three or more participants were required for an inter-bank payment or securities settlement arrangement to qualify as a "system" and be excluded from the scope of the convention. The view was expressed that that matter could be clarified in a commentary to the convention. It was observed, however, that in some countries such payment systems could be established by two correspondent banks. After discussion, the Commission tentatively decided that a definition of payment and securities settlement systems was not necessary (for the continuation of the discussion, see para. 71).

Subparagraph (d) (Rights to payment under bank deposit relationships, including those arising under inter-bank payment systems)

52. It was stated that, with respect to the assignment of receivables arising from deposit accounts and inter-bank payment systems, the convention would not always lead to desirable results and that, in any case, those receivables were regulated by law and by contract in the light of the specific needs of the relevant practices. Some support was expressed in favour of leaving assignments of such receivables within the ambit of the convention (as had been the view in the Working Group), since they were frequent and it was desirable that they should benefit from the harmonized regime of the draft convention. It was observed that, if any special treatment of those receivables was needed (e.g. as regards priority and location), that should be addressed in the context of the relevant draft articles. However, the prevailing view was that those receivables should be excluded, since it was preferable to leave the issue of their assignability and the effects of assignment to the regulation outside the convention. It was stated that interference by the convention in non-assignment clauses in bank deposits might cause misgivings in that industry and might have a negative effect on the acceptability of the convention.

53. There was support in the Commission for excluding the assignment of receivables arising from inter-bank payment systems (whether from the draft convention as a whole or only from articles 11 and 12 remained an open question; see paras. 97-100). However, since those relationships, whether multilateral or bilateral, contained elements of netting, it was suggested that that exclusion should be incorporated into and consolidated with the exclusion of rights to payment under a financial netting agreement (see paras. 46-48). In order to meet some of the concerns expressed, the second part of subparagraph (d) of the proposed exclusion (see para. 38 and para. (x) (ii) (d) of the proposed text) was reformulated thus: "[Rights to payment] [Receivables] arising under inter-bank payment systems or securities settlement systems". In response to the query as to a possible inconsistency with the reformulated version of the exclusion of financial netting arrangements (see para. 48), it was observed that inter-bank payment or securities settlement systems operated within or outside netting arrangements. It was also stated that, in the case of inter-bank payment and securities settlement systems, the assignment of the payment obligation outstanding on the termination of a netting arrangement should be excluded, since there was no market in financing such close-out payment rights.

54. In the discussion, the question was raised as to whether the facilitation by the convention of assignments of financial deposits might run counter to the provisions of law designed to prevent money-laundering. It was noted in response that that was not the case, because any assignments of receivables under the convention would remain subject to any mandatory provisions concerning money-laundering.

Subparagraph (e) (Rights to payment from an insurer under an insurance contract, or from a reinsurer under a reinsurance contract)

55. It was pointed out that the insurance market was regulated in great detail (by contract and statute) and that the draft convention introduced provisions that might not produce the desired results or might even interfere with the contractual and statutory provisions governing those contracts. In addition, there existed many forms of insurance that were subject to different policy considerations and

expectations of the parties and it was difficult to make sure that provisions of the draft convention would not present an undesirable interference with them.

56. The proposal to exclude insurance practices was objected to on the ground that it was desirable to place receivables from insurance contracts on a certain and internationally harmonized legal footing. Such receivables (from different types of insurance contract such as casualty, health, pension, credit or liability insurance) were frequently assigned and were also frequently part of cross-border financing operations, such as factoring. Those operations were developing and it was desirable to facilitate them and reduce their costs and risks by means of the convention. After discussion, the proposal to exclude the assignment of insurance receivables did not obtain sufficient support and the Commission decided not to single out insurance or reinsurance receivables as receivables to be excluded from the scope of the convention as a whole.

Subparagraph (f) (Rights to payment for goods sold or leased that become part of real estate)

57. It was widely felt that the assignment of receivables arising from the sale or lease of goods should not be excluded, even if the goods had temporarily become part of real estate. It was stated that the exclusion of the assignment of such trade receivables from the scope of the convention would significantly reduce its usefulness and undermine its chances for wide adoption. It was also observed that such an exclusion would create uncertainty with regard to the application of the draft convention in view of the divergent approaches taken in various legal systems as to the conditions required for movable goods to become part of real estate.

58. The discussion focused on a reformulated version of subparagraph (f), which was aimed at excluding the assignment of: "[Rights to payment] [Receivables] arising from the sale or lease of real estate". Support was expressed for the reformulated version of subparagraph (f), which would result in avoiding the exclusion of the assignment of trade receivables, without creating undue interference with national law or real estate rights.

59. It was pointed out, however, that the assignment of receivables arising from the lease of real estate should not be excluded. In response, it was observed that it would be counter-productive to attempt to draw a distinction between sales and leases, since leases often had attributes of a sale (e.g. long-term leases with an option to buy) and, in many legal systems, were treated in the same way as sales.

60. On the other hand, it was observed that, while the assignment of receivables arising from leases of real estate could be included in the scope of the convention, it was most important to exclude receivables secured by a mortgage in real estate so as to avoid interfering with national law on the transfer of mortgages in general and on securitization of mortgages in particular. In that connection, a note of caution was struck that the usefulness of the convention would be severely reduced if the assignment of trade receivables (arising from the supply of goods, construction or services) were to be excluded on the sole ground that they happened to be secured by real estate. It was pointed out that commercial and, in particular, construction companies regularly relied on the assignment of receivables secured by a mortgage in real estate or construction sites for obtaining financing. It was also stated that it would be a strange result for the convention not to cover a global assignment of receivables by a commercial entity merely because that entity (assignor) or the

debtor or a third party gave a mortgage as an additional security. It was pointed out that excluding such a global assignment would create uncertainty as to the application of the convention and might lead to inconsistent results (e.g. a conflict arising before a mortgage was given would be covered but not a conflict arising after the mortgage was given).

61. In addition, it was stated that the concern expressed with regard to the effect an assignment of receivables could have on security rights in real estate could be addressed by means of a private international law rule that would refer conflicts of priority between an assignee under the convention and a holder of an interest in real estate with a right in the assigned receivable to the law of the location of the real estate. The following wording was proposed:

> "If the assigned receivable arises from the sale or lease of an interest in land or is secured by such an interest, the rights of the assignee are subject to any competing rights of a person who holds an interest in the land under the law of the State in which the land is situated".

Support was expressed for that proposal. It was stated that the legal analysis underlying the proposal was sound and addressed all relevant issues. In particular, it was pointed out that, if no conflict arose with a holder of a right in real estate under national law and there was no statutory limitation on the assignment of real estate receivables (a matter that might be explicitly addressed in article 9; see para. 131), national real estate markets would not be affected by the convention. In addition, it was observed that the draft convention dealt with the assignment of receivables and did not include any rules that could undermine national real estate markets. It was pointed out, in particular, that article 12 was sufficient in referring to national law issues, such as the distinction between an accessory and an independent right, rights of the debtor as against the assignor and the form of transfer of a security right, whether in real estate or in movable property.

62. However, the view was expressed that the proposed text might not be sufficient to ensure that national real estate markets would not be disrupted. Under such an approach, matters other than priority (and form, which was left to national law by virtue of article 12, para. 5) might fall within the ambit of the convention. It was, therefore, suggested that a broader private international law rule would be necessary. The following language was proposed for inclusion in article 25: "Where the assignment would transfer or create an interest in land or a receivable arising from such an interest, the law of the State in which the land is located will govern the matters specified in article 24". After deliberation, the proposal was modified to read as follows:

> "Where a receivable arises from an interest in land, or where the assignment of a receivable, or any associated transaction, would create or transfer an interest in land, all matters pertaining to that interest in land will be governed by the law of the State in which that land is located for the purposes of this Convention".

Support was expressed for the proposed text. It was stated that an approach based on a special regime to be incorporated in draft article 25 would better address all the concerns expressed. It was observed, however, that there was no real difference between that proposal and the proposal mentioned above (see para. 61), since, under the latter proposal, the law of the assignor's location applied only if its application

would not result in any interference with the law of the State in which the real estate was located.

63. As an alternative to the above-mentioned proposals to deal with the matter by way of a limited exclusion in article 24 or in article 25, it was proposed that, in order to avoid interfering with national mortgage markets, an outright exclusion in article 4, paragraph 1, could relate only to "receivables arising from the sale or lease of real estate that are secured by a mortgage in such real estate". In addition, it was stated that, if the Commission were not able to reach agreement on such an exclusion, an approach based on article 4, paragraph 2, could be considered. Concern was expressed, however, that article 4, paragraph 2, allowing States to exclude an unlimited number of practices, would not be conducive to the uniformity sought to be achieved through the convention.

64. After deliberation, the Commission suspended consideration of the matter to allow time for consultations (for the continuation of the discussion, see paras. 75-87).

Subparagraph (g) (Drawing rights or rights to payment under a letter of credit or independent bank guarantee)

65. The Commission agreed that the assignment of receivables arising from letters of credit or independent guarantees (either as rights to claim payment or rights to receive payment after a valid claim had been made) should not be governed by the convention. It was widely felt that the assignment of such receivables gave rise to special considerations that were dealt with by special non-legislative and legislative texts, including the Uniform Customs and Practices (UCP500), the International Standby Practices (ISP98) and the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (General Assembly resolution 50/48, annex, "the Guarantees and Stand-by Convention").

Subparagraph (h) (Rights to payment arising from foreign exchange contracts)

66. The Commission recalled that foreign exchange contracts would be excluded by the convention insofar as they took place under the auspices of a regulated exchange (see subpara. (a) and para. 43) or involved netting arrangements (see subpara. (c) and paras. 46-48). The discussion focused on foreign exchange contracts that would not fall under subparagraph (a) or subparagraph (c) of the proposed list of exclusions.

67. The view was expressed that the exclusions under subparagraphs (a) and (c) were not sufficient since there were significant practices relating to foreign exchange contracts that took place outside a regulated exchange and were not subject to master netting agreements. It was also stated that, in such situations, financing institutions would rely on statutory rights of set-off, the preservation of which was crucial for controlling the credit risk and thus the cost of a transaction. It was also stated that it was equally essential for financial institutions to be able to rely on non-assignment clauses against possible assignees of the proceeds of foreign exchange transactions. The application of articles 11 and 12 could thus inadvertently result in an increased exposure of the financial institutions to the risk of default by their clients, which would lead to an increase in the financial cost of those transactions. Another argument put forward in support of the proposed exclusion was that foreign exchange transactions were in many countries subject to special

regulation by domestic monetary authorities and that the exercise of those regulatory functions should not be hindered by the convention. Monetary regulations sometimes included restrictions on the assignability of the proceeds of foreign exchange transactions for the purpose of controlling cross-border currency flows.

68. The Commission took note of those concerns. Nevertheless, it considered that there was no compelling reason to exclude those residual foreign exchange transactions from the scope of application of the convention. Financial institutions that wished to avoid the application of the convention to their foreign exchange transactions remained free to use netting agreements for those transactions, thereby qualifying for exclusion under the appropriate provision. In addition, it was widely felt that, to the extent that statutory regulations restricted the assignability of receivables arising under foreign exchange contracts, they would remain unaffected by the convention as a whole and articles 11 and 12 in particular. Moreover, it was generally felt that article 20 was sufficient to preserve the debtor's rights of set-off. After discussion, the Commission decided that subparagraph (h) should be deleted.

Subparagraph (i) (Rights to payment arising from the sale or lending of investment securities, including repurchase agreements and rights to payment arising under investment securities settlement systems)

69. It was recalled that rights to payment arising under investment securities settlement systems would be covered under subparagraph (d) as revised (see para. 53), while the sale or lending of investment securities would not be covered by the exclusions with respect to netting arrangements and transactions on a regulated exchange. Support was expressed for the exclusion. It was stated that investment securities were sold, lent or traded pursuant to repurchase agreements in well-established and regulated markets and that the convention (e.g. the rules on representations, set-off and priority) might have a disruptive effect on those markets. In response, it was argued that the fact that those transactions were subject to regulation by national law was not sufficient to justify their exclusion from the scope of the convention, since the convention would not affect any statutory limitations on assignment. It was therefore suggested that, if necessary, States could make use of the right recognized in article 4, paragraph 2, to exclude certain practices by making a declaration under article 39. It was said in reply that, to the extent any practices should be excluded from the Convention, it would be preferable to exclude them explicitly in article 4, paragraph 1, and not by a unilateral declaration by a State pursuant to articles 4, paragraph 2, and 39, since such an approach would not advance uniformity and might create uncertainty as to the application of the Convention. After discussion, pending final determination of the question whether exclusions should relate to the convention as a whole or to articles 11 and 12 only, the Commission tentatively decided that sales and loans of investment securities should be excluded (see also para. 72).

Revised consolidated list of exclusions

70. Subsequently, the Commission reviewed the results of its consideration of the types of receivables that should be excluded from the convention. The Commission did so on the basis of a draft prepared by an informal ad hoc group for inclusion in article 4, paragraph 1, which read as follows:

"[The Convention does not apply to]:

"(a) Receivables arising from transactions on a regulated exchange;

"(b) Receivables arising under financial contracts governed by netting arrangements, except a receivable owed on the termination of all outstanding transactions;

"(c) Receivables arising from bank deposits;

"(d) Receivables arising under inter-bank payment systems or investment securities settlement systems;

"(e) Receivables under a letter of credit or independent bank guarantee;

"(f) Receivables arising from the sale or loan of investment securities."

71. Recalling its earlier discussion on the definition of "payment and securities settlement systems" (see para. 51), the Commission decided that, in subparagraph (d), reference should also be made to inter-bank payment agreements. It was widely felt that, in addition to payment and securities settlement systems, payment arrangements between two correspondent banks should be excluded from the scope of the convention.

72. With respect to subparagraph (f), the suggestion was made that it should be revised to refer also to the holding of investment securities. In response to a question, it was stated that the direct or indirect holding of investment securities, whether they were in paper or in electronic form ("dematerialized securities"), could generate receivables, such as the balance in a securities account, dividends from securities or the price from the sale of securities. It was generally agreed that the assignment of such receivables should be excluded from the draft convention, for the same reasons that the assignment of receivables arising from the sale or loan of investment securities was to be excluded (see para. 69).

73. The Commission also considered the definitions of "financial contract" and "netting agreement" that were referred to in subparagraph (b) of the above-mentioned list of exclusions (see para. 70) and should be included in article 6. The draft definitions (modelled closely on the text suggested by the European Banking Federation in document A/CN.9/472/Add.1) were as follows:

"(n) 'Financial contract' means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, any deposit transaction and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above;

"(o) 'Netting agreement' means an agreement which provides for one or more of the following:

"(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;

"(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values,

conversion of such sums into a single currency and netting into a single payment by one party to the other; and

"(iii) The set-off of amounts calculated as contemplated by the preceding subparagraph (ii) under two or more netting agreements."

74. It was noted that, in view of the Commission's earlier discussion of those definitions (see paras. 49-51), the reference to deposit accounts and to collateral and credit support systems in the definition of "financial contract" had been deleted. Wide support was expressed for those definitions as revised. It was agreed that deposit accounts were excluded by virtue of subparagraph (c) of the revised list of exclusions (see para. 70). A suggestion was made to remove receivables arising from deposit accounts from the list of excluded practices, but that suggestion did not receive sufficient support. The Commission also agreed that collateral and credit support systems did not fit into a definition of "financial contract". After discussion, the Commission adopted the above-mentioned list of exclusions and definitions and referred them to the drafting group.

Real estate receivables

75. The Commission resumed its deliberations on real estate receivables (see paras. 57-64). The discussion focused on a proposal that read as follows:

"Where a receivable is connected with an interest in land, the law of the State in which the land is situated governs all matters pertaining to that interest and the priority of the right of the assignee with respect to the competing right of a person who holds an interest in the land."

76. It was stated that the proposed text was intended to apply in all cases, irrespective of the connection of the receivable to land (e.g. whether the receivable arose from the sale or lease of land, or was simply secured by an interest in land), and to preserve the application of the law of the land on all matters relating to an interest in land. It was also observed that the second part of the proposed text was intended to address a more limited issue, namely, the issue of the law applicable to a conflict of priority between an assignee under the convention and the holder of an interest in land under the law of the land. Strong support was expressed for that proposal. It was stated that the proposed text would address the concerns expressed with regard to statutory limitations on assignments that could have an impact on interests in land, as well as any other public policy concerns in that regard. As a matter of drafting, it was suggested that the first and the second part of the proposed text should be connected with the word "including". That suggestion was objected to, since the second part of the proposed text contained a limited rule dealing with the law applicable to priority with respect to the receivable, while the first part dealt with the law applicable to all matters relating to an interest in land.

77. At the same time, a number of concerns were expressed. One was that the proposed text was overly broad and could inadvertently result in excluding from the scope of the convention transactions that were intended to be covered (e.g. an assignment of a receivable embodied in a promissory note and secured by a mortgage or the assignment of the income flow from an amusement park or a golf course). In particular, the words "connected" and "all matters pertaining" were considered to open up the scope of the proposed text too broadly and to be introducing an unacceptable degree of uncertainty. It was observed that commercial

loans were often secured by personal property and real property. In such situations, it was pointed out, priority with respect to the land-related receivable could be referred to the law of the land only if, under the law of the land, priority were to be subject to registration in a public registry and if a conflict with a holder of an interest in land were to arise. In that connection, it was stated that, if the assignee had not registered its interest in the land and the assignor were to become insolvent, the assignee's priority with respect to the insolvency administrator should be subject to the law of the assignor's location. It was also stated that, even if the assignor had assigned the same receivable to another assignee who had not registered either, priority should again be determined under the law of the assignor's location. Furthermore, it was observed that the only situation in which the law of the land could apply and the assignee could be defeated would be where a subsequent assignee had registered its interest under the law of the land. The second part of the proposed text was intended to cover that limited conflict situation.

78. Another concern was that the mere fact that a receivable had some connection to real estate, irrespective of the value of the real estate compared to the value of the receivable, was not sufficient to justify a change in the law governing priority. It was stated that, if the convention were to include a rule on the law governing conflicts of priority with respect to real estate receivables, that rule should be appropriately cast so as to avoid any undue interference with financing practices involving such receivables. Doubt was expressed as to whether the rule contained in the proposed text would be suitable for real estate financing and for financing on the basis of receivables secured by a mortgage. In any case, it was stated that a rule that would make it necessary for any receivables financier to investigate whether the relevant receivables were secured by a mortgage so as to establish whether the convention applied would be unacceptable. In order to address the concerns expressed, it was suggested that the convention should deal only with a conflict between an assignee who acquired, under article 12, an interest in the land securing payment of the assigned receivable and a holder of an interest in land, which by virtue of the law of the land extended to the receivable. Such a rule should preserve the application of the law of the land either by excluding that type of conflict from the scope of the priority rules of the convention or by giving priority to the holder of an interest in land, if that person would have priority under the law of the land.

79. The following language was proposed:

> "If a receivable is associated with the land such that under the law of the State in which the land is situated a person with an interest in the land has rights in that receivable, then the rights of the assignee with respect to the receivable are subordinate to the rights of any person to whom under the law of the State in which the land is situated the assignee's rights would be subordinate."

It was explained that the proposed rule was designed to have a narrow scope of application, since it required that a receivable be associated with land and that, under the law of the land, a person with an interest in land acquired an interest in the land-related receivable. It was explained that the proposed rule did not address conflicts with respect to interests in land, since article 12 was thought to be sufficient to ensure that any conflict with respect to interests in land would be resolved by the law of the land. It was also understood that the proposed rule would have no application if, as a result of debtor default, the assignee of a receivable secured by a mortgage were to foreclose and sell the land, as long as the assignee

had met all the requirements existing under the law of the land for the acquisition of interests in land.

80. Some support was expressed for the proposal mentioned above. In order to ensure that the proposed text would cover not only rental payments but also receivables secured by real estate, the suggestion was made that it should be amended as follows: "Where a receivable is secured by land or arises from a lease of land ...". At the same time, a number of concerns were expressed. One was that the proposed text failed to address all situations in which the convention might affect rights in land under the law of the land. In response to a question as to whether article 9 (in particular, as reformulated; see para. 131) would not cover any concern relating to statutory limitations relating to land-related receivables, it was observed that article 9 would address most but not all public policy concerns. In response to a further question as to whether article 25 would address those remaining public policy concerns, it was stated that the article might not be sufficient in that regard.

81. In order to bridge the gap between the two diverging proposals (see paras. 75 and 79), the following language was proposed: "No provision in this Convention shall affect the application of the law of the real estate when the assignment of a receivable is linked to that real estate". While the proposal was met with interest, it was stated that it might inadvertently result in creating uncertainty as to the application of the convention. The mere fact that, for example, a mortgage in real estate of a minor value was given could result in removing the assignment of receivables of considerable value from the scope of the convention. It was also pointed out that the only issue that needed to be covered was the conflict between an assignee under the convention and the holder of an interest in land linked to the receivable assigned. Statutory limitations with respect to the assignment of land-related receivables would be sufficiently covered by revised article 9 (see para. 131), while article 12 would be sufficient to ensure that any conflicts with respect to competing interests in land would be subject to the law governing interests in land by virtue of the rules of private international law outside the convention.

82. However, the concern was expressed that addressing only issues of priority would not be sufficient to preserve the application of the law of the land on all matters pertaining to an interest in land. For that reason, support was expressed for the proposal mentioned above (see para. 80) or for allowing States to exclude the assignment of land-related receivables from the scope of the draft Convention (see articles 4, paragraph 2, and 39). It was widely felt that every effort should be made to define clearly the scope of the convention so that no further exclusions would need to be made by States, since such an approach would reduce certainty with respect to the application of the convention and result in its having a different scope from State to State.

83. In an effort to reach consensus, the following language was proposed:

> "In the case of a receivable secured by or arising from the sale or lease of an interest in real estate, nothing in this Convention:
>
> "(a) Affects the rights of a person entitled to priority in the receivable pursuant to the real estate law of the State in which the real estate is located; or

"(b) Authorizes an interest in the real estate that is not permitted under that law."

84. It was explained that the proposed text was intended to ensure that the convention would not affect the priority of a holder of an interest under the real estate law of the land and would not create an interest in land not permitted by the law of the land. While the proposal attracted support, with regard to subparagraph (a), concern was expressed that the reference to the real estate law of the land was insufficiently clear and overly restrictive, since priorities were normally governed by other law, including insolvency law. In response, it was stated that referring to the law of the land in general would remove from the scope of the convention any conflicts of priority with respect to receivables linked to land, no matter how remote or artificial that link might be. Such a result would undermine the certainty sought through articles 24-27 and was said to be unacceptable, since it would fail to cover significant conflicts of priority with respect to receivables. The example was given of a conflict between two assignees in country A of a receivable secured by a mortgage in country B.

85. It was stated, however, that, as long as the convention made it clear that it was not intended to prejudice rights under real estate law, there would not be a need to address the specific issue of priority dealt with in subparagraph (a) of the proposed text. In response it was observed that, in the absence of subparagraph (a), the law of the assignor's location would inadvertently apply by virtue of article 24 to a conflict between an assignee under the convention and a holder of a right in land that, under national law, was extended to the receivable.

86. As to subparagraph (b), the suggestion was made that it should refer to "interference" with the law of the land. That suggestion was objected to, since the term "interference" might be excessively broad and was in any case unclear. As a matter of drafting, the suggestion was made that subparagraph (b) should refer to authorization with respect to the acquisition of a right in land, a suggestion that received wide support.

87. Subject to preserving the priority of interests in land arising from law governing interests in land, the Commission approved the text reflected in paragraph 83 and referred it to the drafting group. The Commission continued its discussion with respect to receivables arising from real estate transactions on the basis of a text to be added in article 4, which read as follows:

"[3.] This Convention does not:

"(a) Affect the question whether a property right in real estate is a right in a receivable related to that real estate;

"(b) Affect the priority of the right in real estate with respect to the right of an assignee of the receivable; or

"(c) Make lawful the acquisition of property rights in real estate not permitted under the law of the State where the real estate is situated."

The concern was expressed that subparagraph (a) departed from the policy approved by the Commission (see paras. 83-87) and was incomprehensible, since an interest in real estate could not be an interest in a related receivable. In response, it was stated that subparagraph (a) was a logical prerequisite for a conflict of priority as

described in subparagraph (b) to arise. As to whether the holder of an interest in land could have an interest in land-related receivables and thus find itself in a conflict of priority with an assignee of those receivables, by way of an example, it was stated that in many jurisdictions the buyer of a building acquired an interest in rents from the lease of the building. As a matter of drafting, it was suggested that the word "confers", "contains" or "includes" should be substituted for the word "is" in subparagraph (a). After discussion, the Commission approved the proposed text and referred it to the drafting group.

Further practices to be excluded (assignments of receivables from sales or leases of aircraft, space equipment and railway rolling stock)

88. The suggestion was made that, for the same reasons mentioned above (i.e. highly regulated, special markets that did not need to be covered by the convention), the assignment of receivables arising from leases of or secured by certain types of high-value mobile equipment should be excluded from the convention. In favour of that proposal, it was stated that an outright exclusion of such practices would avoid introducing rules that might not be appropriate (e.g. articles 11, 12 or 24). It was also observed that such an approach would result in avoiding creating conflicts with a draft convention currently being prepared by the International Institute for the unification of Private Law (Unidroit) ("the draft Unidroit convention") and other organizations. In that connection, it was explained that further to the decision of the relevant bodies preparing those texts to limit the scope of their work to aircraft, space equipment and railway rolling stock (instead of to any "uniquely identifiable object"), an outright exclusion would be a limited one and would not risk excessively limiting the scope of the draft convention being prepared by UNCITRAL. Furthermore, it was explained that the draft Unidroit convention and the protocols thereto dealt in an industry-specific way with remedies upon default of the debtor and introduced a priority regime based on international, equipment-specific registries.

89. In order to implement that proposal, language along the following lines was suggested for inclusion in the list of excluded practices in draft article 4, paragraph 1: "The assignment of rights [to payment] arising from transactions in which mobile equipment is leased or is the primary real security for obligations incurred". That language would be supplemented by the following definition: "'Mobile equipment' means airframes, aircraft engines, helicopters, railway rolling stock and space property." In response to a question, it was stated that, while there was not yet a definition of the term "space property", that term was used to reflect not only equipment in outer space (e.g. satellites), but also any associated rights (e.g. any telemetry, tracking and command facility; satellite command and control software, as well as access codes; and governmental authorizations for use of the assigned orbital location and associated radio frequencies). It was observed that, as a practical matter, the right of a secured creditor to take possession of a satellite could not be assured without the associated rights. As a result, exclusion of associated rights from a security interest in the relevant satellite itself would erode the commercial value of the satellite as collateral and thus undermine the ability of satellite manufacturers, launch service providers and satellite operators to obtain financing offering non-possessory security interests in their satellites. It was also stated that it was important for the draft Convention to avoid any interference with the draft space protocol being prepared, since that draft protocol would be the first

international text dealing in a comprehensive way with security interests in space equipment (although other international texts, such as the Unidroit Convention on International Leasing (1988), could be considered applicable to the lease of space equipment).

90. Strong support was expressed initially for the proposed exclusion. It was stated that those categories of mobile equipment were of a kind traditionally regarded as enjoying special status, which was recognized in the proposed new international regime provided in the draft Unidroit convention and protocols. In addition, it was pointed out that the highly specialized nature of financing techniques of such mobile equipment required that assignments of receivables taken as security be dealt with in equipment-specific instruments. Moreover, it was said that the proposed exclusion was needed in order to preserve the concept of indivisibility of the asset and the associated rights, a concept enshrined in articles 8, paragraph 1, and 10 of the draft Unidroit convention. That concept could be undermined if the debtor could assign receivables derived from such high-value mobile equipment under a system different from that applicable to that mobile equipment. In order to avoid such a result, the assignment of receivables arising from the following transactions, in particular, should be excluded from the scope of the convention: the financing of sales by sellers retaining title until full payment of the price; the financing of sales by third-party financiers obtaining a security right in the relevant mobile equipment; the financing of leases in which rental payments were fused with the mobile equipment; and the financing of companies owning mobile equipment by financiers obtaining a security right through loans primarily secured by the mobile equipment.

91. The view was expressed that a conflict between two texts that had not yet been finalized could not be addressed by means of an outright exclusion of certain practices. Such an approach would result in a legal vacuum until the more specialized text had been finalized and had entered into force. It was therefore suggested that the matter should be left to article 36 and to the draft Unidroit convention and protocols that could supersede the draft convention being prepared by UNICITRAL. In response, it was pointed out that the main issue was not one of conflicts between two international texts, but the need to avoid interference with a well-functioning and highly specialized practice. The issue of conflicts between international texts was a secondary one and related not only to a future international text but also to currently existing international conventions. In any case, an approach based on article 36 or on general treaty law would fail to provide the certainty necessary for credit to be made available at affordable rates. In that connection, it was explained that, in order to determine which text applied, parties would need to establish the location of the relevant parties in a State having made a declaration, as well as the effect of such a declaration.

92. The view was also expressed that an outright exclusion would be inappropriate, since the draft convention appropriately dealt with financing on the basis of receivables in a broad way and had a different objective from the draft Unidroit convention and protocols on international interests in mobile equipment. In addition, it was observed that the proposed language might be excessively broad in that it would inadvertently result in excluding an assignment of a receivable from the scope of the convention, even if the owner of the mobile equipment had paid the price secured by the security in the mobile equipment. It was considered that such a

result would be inappropriate. It was, therefore, suggested that it would be better to leave the matter to parties to choose by opting into the draft convention being prepared by UNCITRAL or the draft Unidroit convention and protocols on international interests in mobile equipment. In response, it was stated that rights associated with security interests in high-value mobile equipment were, in some important practices, inextricably linked with that equipment and those transactions could not be subject to a different law on assignment of receivables. It was also stated that leaving the matter to parties would create uncertainty as to the application of both conventions.

93. The concern was expressed that the proposed language left open the question whether the assignment of receivables in transactions in which the types of equipment to be excluded were not the primary security would be covered by the draft UNCITRAL convention or by the draft Unidroit convention and protocols on international interests in mobile equipment. It was stated that, in such situations, a conflict could arise between the relevant texts and the problem should be addressed in the draft UNCITRAL convention. In response, it was stated that in situations in which the security in the types of mobile equipment proposed to be excluded would be only a secondary security the assignment of receivables would not be excluded from the scope of the convention.

94. The concern was also expressed that, unless the scope of the exclusion was carefully delimited, a general financier might be able to change the regime applicable to assignments by including in a receivables financing transaction an aircraft receivable. In addition, it was stated that an exclusion of assignments of receivables from railway rolling stock and space equipment was not possible at the current stage, especially as the scope of the relevant draft protocols was still unclear and in any case they had yet to be considered and approved in an intergovernmental context. It was also observed that chapter IX of the draft Unidroit convention (dealing with assignments of international interests and "associated rights", including receivables) had not been finally adopted and that alternative provisions had been annexed to that chapter on the understanding that that matter would be re-examined by a small expert group before the diplomatic conference planned so as to conclude the draft convention. Furthermore, it was pointed out that an approach based on an exclusion would inadvertently result in an exclusion of a wide range of practices from the scope of the convention, whether or not a country was a party to the draft Unidroit convention or had legislation dealing with such matters. Moreover, even an approach based on article 36 would need to be deferred until the draft UNIDROIT convention and protocols had been finalized. Furthermore, including the assignment of aircraft and similar receivables within the ambit of the UNCITRAL convention would not risk disrupting any markets. In that connection, the attention of the Commission was drawn to the fact that recent studies had shown that the exclusions sought would create special regimes where none currently existed and might unduly affect significant practices, such as those involving the securitization of aircraft receivables.

95. In response, it was pointed out that, while the Commission might benefit from further consultations on the matter, it was clearly essential to resolve it in a reasonable way and to the satisfaction of the relevant industry so as to avoid raising opposition to the draft convention. It was also stated that an approach based on a limited exclusion of receivables that were inextricably linked with a high-value type

of equipment and a priority rule referring to the State of registration might work well, at least for aircraft financing practices. In addition, a solution based on article 36, dealing with conflicts with other international texts, could not fully address the problems under discussion. In opposition to that view, it was observed that article 36 would be sufficient to settle the matter. In addition, the fact that receivables were inextricably linked with the equipment did not justify an exclusionary approach. The key issue was that under the draft Unidroit convention and protocols an equipment financier would always have priority over a receivables financier.

96. Noting the strong views expressed both in favour of and against an exclusion of assignments of receivables arising from transactions relating to high-value, highly mobile assets, the Commission decided to defer a decision on the matter until the draft Unidroit convention was closer to completion, which would allow Governments to undertake the necessary consultations with the relevant industries.

Placement of the list of receivables to be excluded

97. The Commission considered the question whether the receivables in the list were to be excluded from the draft convention *in toto* or whether the identified receivables should receive special treatment only in certain provisions. Some support was expressed for a selective approach, according to which each receivable would be excluded (or dealt with in a special way) only to the extent necessary to avoid problems in a particular area, while preserving the applicability of other provisions of the draft convention. That approach was said to be in line with the desire to obtain as broad as possible a scope of application of the convention and to facilitate, to the extent possible, assignment-related financing operations. Nevertheless, the widely prevailing view was that it was preferable to exclude the identified receivables completely from the sphere of application of the convention. That view was a result of the assessment according to which tailor-made exclusions would cause difficulties of interpretation and would complicate the application of the convention. It was stated, in particular, that variant B of article 5 would have to be expanded and tailored so as to adapt the convention to the needs of particular types of practices. Such adjustments, it was observed, might be necessary as regards, for example, priority issues, rights of set-off, representations and the meaning of the term "location". Furthermore, total exclusions would reduce the need for (or make superfluous) articles 4, paragraph 2, and 39, which by allowing States to exclude further practices might create complications in the application of the Convention.

98. After having suspended consideration of the matter to allow some time for consultation among delegates, the Commission continued its discussion, focusing on the question whether the list of practices to be excluded from the scope of the convention should be placed in article 5 and incorporated into variant B or articles 11 and 12. Some support was expressed in favour of placing the list in article 5, variant B. It was stated that excluding the practices mentioned in that list only from the scope of articles 11 and 12 would be in line with the overall policy, approved by the Commission, that the scope of the convention should be as broad as possible. It was also observed that such an approach would enhance predictability with regard to the application of the convention. At the same time, it was recognized that the definition of "trade receivable" in variant B of article 5 introduced an unacceptable degree of uncertainty and should therefore be deleted, while direct reference to

specific practices should be made. The following language was proposed for inclusion in draft article 5:

> "Articles 11 and 12 [and section II of chapter V] do not apply to assignments of receivables [list of practices to be excluded]. With respect to the assignment of such receivables, the matters addressed by these articles are to be settled in conformity with the law applicable by virtue of the rules of private international law."

99. The prevailing view, however, was that the list of practices to be excluded should be placed in article 4. It was stated that, if those practices were to be excluded only from the scope of articles 11 and 12, the convention might still apply, depending on whether the law applicable outside the convention would give effect to anti-assignment clauses. In such a case, it was stated, the Commission would need to adjust a number of provisions of the draft convention (e.g. the rules on "location", representations, debtor's rights of set-off and priority issues) to the particular needs of the practices proposed to be excluded. In the discussion, the suggestion was made that in subparagraph (d) of the proposed list of exclusions (see para. 70), language might need to be added to ensure that inter-bank payment systems and securities settlement systems were excluded "whether or not they are governed by netting agreements". It was also suggested that subparagraph (f) should indicate clearly that it included repurchase agreements.

100. After discussion, the Commission decided that the list of practices to be excluded should be appropriately incorporated into article 4 and referred the matter to the drafting group (as to whether articles 5 and 6, paragraph 1, should be retained, see paras. 104-108 and 151).

Specific list of receivables to be included

101. The Commission subsequently turned to a discussion of the advisability of including in the draft convention a list of receivables, the assignment of which would be covered by the convention. In support of such a list, it was stated that it would provide immediate and express assurance and clarification to the interested industries benefiting most from the convention that those practices were covered by it. Those practices included, in particular, the supply of goods, works and services, the sale or licence of intellectual property, credit card transactions, as well as the lending of money and payments on guarantees or surety obligations. Such an approach was said to be a practical one that would foster the acceptability of the convention and facilitate its interpretation. However, there was considerable opposition to including such a list of practices. The opinion was expressed that such a list would unnecessarily limit the scope of application of the convention and thus run counter to the generally approved policy for the convention to have as broad a field of application as possible. In addition, a juxtaposition of a list of exclusions and a list of inclusions might cause difficulties of interpretation with respect to practices for which it was not entirely clear where they belonged or practices that might develop in the future. Moreover, it was observed that the list would be superfluous, since it would be merely restating, by using the most typical examples, the transactions that were covered by the convention by virtue of article 2. Furthermore, it was stated that if the list of practices to be excluded were to be added in article 4, paragraph 1, article 5 would not be necessary and, as a result, a

distinction between financial and trade receivables would be superfluous and could inadvertently result in excluding trade receivables.

102. The Commission adopted the view that the convention should not set out a list of transactions to be included in the scope of the convention, but that a clarification to that effect should be made in a commentary or in the preamble to the convention.

103. After having suspended consideration of the matter to allow time for consultation among delegates, the Commission resumed its deliberations on the list of practices proposed to be included in the scope of the convention. While the view was expressed that such a list might usefully further clarify the scope of application of the convention, it was widely felt that such a list was not necessary. It was stated that article 2, which defined "assignment" and "receivable" in sufficiently broad terms, was sufficient to cover all the practices included in the list. It was also observed that a list of practices to be included might inadvertently limit the scope of application of the convention even further than intended. In the discussion, it was suggested that the list of practices to be included might be usefully mentioned in a commentary or in the preamble to the convention. After discussion, the Commission decided that no reference should be made to such a specific list of practices for the purposes of defining the scope of application of the convention.

Practices to be excluded from the scope of articles 11 and 12

104. The Commission next considered the related question whether certain practices should be excluded from the scope of articles 11 and 12 (see para. 38). It was proposed that variant B of article 5 be retained and supplemented by a definition of "trade receivable", which would read as follows:

"'Trade receivable' means a receivable:

"(i) Arising under an original contract for the sale or lease of goods or the provision of services other than financial services;

"(ii) Arising under an original contract from the sale, lease or licence of industrial or other intellectual property or other information;

"(iii) Representing the payment obligation for a credit card transaction."

105. In support of that proposal, it was stated that there were other practices beyond those to be excluded in article 4 for which articles 11 and 12 would not be suitable. The example was given of loan syndication, as well as factoring and invoice discounting agreements, in which anti-assignment clauses were normally given effect. It was observed that, if those practices were excluded from the scope of articles 11 and 12, by virtue of the second part of article 8, paragraph 2, the effectiveness and the legal consequences of anti-assignment clauses would be left to law applicable outside the convention. As a result, if the applicable law were to give effect to an anti-assignment clause, an assignment would not be effective and the convention would not come into play. If, on the other hand, the applicable law gave no effect to the anti-assignment clause, the assignment would be effective and the convention would apply. For that reason, the preservation of the application of the debtor protection provisions, contained in section II of chapter IV (through a deletion of their exclusion in article 5, variant B), was considered most important. In response to a question, it was clarified that those provisions of the convention

could apply to practices to be excluded from the scope of articles 11 and 12 without risking disrupting those practices.

106. At the same time, the proposal raised a number of concerns. One concern was that the distinction between trade and financial receivables would create uncertainty. It was stated that the reference to financial services in the above-mentioned definition (see para. 104) left open whether it included only services by banks or also by other finance service providers. A suggestion to refer only to banks was objected to on the ground that such an approach would fail to address practices involving, for example, insurance companies. Another concern was that the proposed exclusion might inadvertently result in excluding the assignment of a trade receivable merely because, subsequent to the original assignment by a trader to a bank, it was assigned by that bank to another bank. In response, it was stated that, once a receivable was a trade receivable, it would always be a trade receivable (and, as a result, its subsequent assignment by a bank would not be excluded by the proposed text). Yet another concern was that the distinction could lead to inconsistent results (e.g. an assignment of trade receivables backed by a letter of credit would not be covered, while an assignment of receivables without any credit guarantee would fall within the ambit of the convention).

107. In order to address those concerns, the suggestion was made that the scope of articles 11 and 12 could be limited by way of a specific list of exclusions without any reference to a definition of "trade receivable". The above-mentioned proposal (see para. 104) was amended to read: "Draft articles 11 and 12 apply only to assignments of receivables [list (i)-(iii) from para. 6]." A query was raised as to the meaning of the term "financial services" and in particular as to whether the term would include services offered by an institution other than a financial institution. The Commission decided to postpone consideration of the proposal until it became available in versions in all six official languages of the United Nations (for the continuation of the discussion, see paras. 145-151).

108. During the discussion, it was suggested that receivables arising from bank deposits should be excluded from the scope of articles 11 and 12, but not from the scope of the convention as a whole. While some support was expressed for that suggestion, it was widely felt that it could not be adopted, since, in particular, the definition of the term "location" would not be appropriate for banks. It was stated that, if the anti-assignment clause were not given effect by the law applicable, the assignment could be effective, the convention could apply and, as a result, priority issues with respect to a conflict with a branch of a bank would be referred to the law of the State in which the head office of that bank was located, a result that was said to be inappropriate. For that reason, the Commission decided to retain the assignment of receivables arising under deposit accounts in the list of practices to be excluded from the scope of the convention as a whole (see para. 70).

Further exclusions by States through declarations (articles, 4, paragraph 2, and 39)

109. It was noted that articles 4, paragraph 2, and 39 were intended to enhance the acceptability of the draft convention to States by allowing them to exclude further practices from the scope of the convention as a whole. It was widely felt, however, that those provisions should be deleted. It was stated that an approach along the lines of articles 4, paragraph 2, and 39 would result in uncertainty, since the scope

of the convention might become difficult to determine and, in any case, might end up being different from State to State. Pending final determination of the scope of articles 11 and 12, the Commission decided to defer a final decision on articles 4, paragraph 2, and 39 to a later stage (for the continuation of the discussion, see para. 152; see also para. 32).

Chapter II. General provisions

Article 6. Definitions and rules of interpretation

110. The text of draft article 6 as considered by the Commission was as follows:

"For the purposes of this Convention:

"(a) 'Original contract' means the contract between the assignor and the debtor from which the assigned receivable arises;

"(b) 'Existing receivable' means a receivable that arises upon or before the conclusion of the contract of assignment; 'future receivable' means a receivable that arises after the conclusion of the contract of assignment;

"[(c) 'Receivables financing' means any transaction in which value, credit or related services are provided for value in the form of receivables. Receivables financing includes factoring, forfeiting, securitization, project financing and refinancing;]

"(d) 'Writing' means any form of information that is accessible so as to be usable for subsequent reference. Where this Convention requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person's approval of the information contained in the writing;

"(e) 'Notification of the assignment' means a communication in writing which reasonably identifies the assigned receivables and the assignee;

"(f) 'Insolvency administrator' means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the assignor's assets or affairs;

"(g) 'Insolvency proceeding' means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

"(h) 'Priority' means the right of a party in preference to another party;

"(i) A person is located in the State in which it has its place of business. If the assignor or the assignee has more than one place of business, the place of business is that place where its central administration is exercised. If the debtor has more than one place of business, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person;

"(j) 'Law' means the law in force in a State other than its rules of private international law;

"(k) 'Proceeds' means whatever is received in respect of an assigned receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods;

"[(l) 'Trade receivable' means a receivable arising under an original contract for the sale or lease of goods or the provision of services other than financial services.]"

111. The Commission decided to postpone the discussion of subparagraphs (c), (h) and (j) until it had had a chance to consider the title and the preamble, the priority rules and the federal state issues in the final provisions (for the discussion of subparagraph l, see paras. 104-107 and 145-151; with regard to subparagraph (c), see para. 184).

112. Discussion focused on subparagraph (i) (definition of "location"). It was generally agreed that the subparagraph was one of the most important provisions of the convention, since it was relevant for the determination of the scope of application and the priority rules of the convention. Differing views were expressed.

113. One view was that subparagraph (i) was in principle an appropriate rule that would work well in the majority of cases. According to that view, the subparagraph would not work as well for those industries which operated with branch offices (in particular, the banking and insurance industry). In support of that view, it was observed that it would not be appropriate to refer priority issues with respect to transactions of a company made through a branch office in one country to the law of another country where that company happened to have its central administration. In addition, it was stated that failing to address that matter might result in reducing the acceptability of the convention. In order to address those special cases in which a place-of-central-administration rule might not work, a number of suggestions were made. One suggestion was to refer to the location of the branch in whose books the receivables appeared immediately before the assignment (see A/CN.9/466, paras. 98 and 99). That suggestion was objected to on the grounds that such an approach would not enhance certainty and transparency, since third parties would not know in whose books the receivables appeared and, in any case, books (in a paper or electronic form) could be kept in a jurisdiction that was irrelevant to the assignment contract. Another suggestion was that the exception could be formulated along the lines of article 1, paragraph 3, of the UNCITRAL Model Law on International Credit Transfers ("branches and separate offices of a bank in different States are separate banks"). That suggestion was objected to on the grounds that such an approach would not resolve the problems arising in the case of a conflict between an assignment of the same receivables by two different branch offices of the same bank, while it would be very difficult to reach agreement on a uniform definition of the term "bank". Those objections were cited against another suggestion made to refer to the branch of a banking or insurance company with which the assignment had the closest relationship.

114. Another view was that the location of branch offices needed to be addressed in a consistent manner for all industries that operated throughout the world through branch offices rather than through independent subsidiaries. Accordingly, instead of

introducing a narrow exception for banks and insurance companies, a different location rule should be introduced that would deal with the location of the assignor, the assignee and the debtor on the basis of the place of business with the closest relationship with the relevant contract. Various suggestions were made, including a suggestion that subparagraph (i) should read:

> "If the assignor or the debtor has more than one place of business, the relevant place of business is the one which has the closest relationship to the original contract. If the application of this rule designates more than one place of business of the assignor or the assignee [, located in different States], the relevant place of business is that where its central administration is exercised."

Support was expressed for that suggestion, in particular in view of the fact that it would solve the problem of determining the location of the assignor in the case of multiple assignments by branch offices of the same entity.

115. However, the suggestion was objected to on the grounds that reference to a closest-connection test would significantly reduce the certainty aimed to be achieved through the convention and would have a negative impact on the cost and the availability of credit. It was pointed out that, in the case of future receivables, the place with the closest connection to the original contract could not be determined at the time of assignment and, in the case of bulk assignments, there might be various places with closest connection to the original contracts as there were several original contracts. It was also observed that, in many practices, the considerations applicable to the determination of the location of the assignor (borrower) and the assignee would normally differ from the relevant considerations in the determination of the location of the debtor. It was also stated that the suggestion failed to take into account the need to link the location of the assignor with the assignment contract, which in that context was more important than the original contract. In view of the wide divergence of views, the suggestion was made that a place-of-business approach should be followed to define the location for the application of the convention and a central-administration rule should be adopted for the purposes of the priority provisions of the convention. That suggestion was objected to as it would fail to enhance certainty with regard to the application of the convention and would lead to inconsistent results, without resolving the problems arising with regard to branch offices.

116. During the discussion, a number of additional suggestions were made with regard to other issues. One suggestion was that, in cases where the location of the debtor could not be determined, reference should be made to the place of the central administration or the place from which payment emanated. There was insufficient support in the Commission for that suggestion. Another suggestion was that subparagraph (i) should be revised to deal with multiple places of business only if they were located in different countries. While it was noted that that matter was already implicit in subparagraph (i), it was agreed that it could usefully be clarified further. Another suggestion was that, for the sake of clarity, reference should be made to the "ordinary" rather than to the "habitual" residence of the debtor. There was no support for that suggestion.

117. Subject to the reference to more than one place of business in different countries, the Commission approved the substance of subparagraph (i) and referred it to the drafting group.

118. With regard to subparagraph (k), concern was expressed that, by excluding from the definition of "proceeds" goods returned by the buyer to the seller (e.g. because they were defective, because the sales contract was cancelled or because the buyer did not wish to retain them after the expiry of a trial period), it could inadvertently undermine certain practices. It was explained that in such practices the assignee, having paid the assignor/seller, acquired a property right in any goods returned by the buyer to the assignor/seller. The suggestion was made that the last sentence of subparagraph (k) should be deleted, since in any event, under subparagraph (k), "proceeds" would not encompass "returned goods". The Commission noted that the issue of "returned goods" arose in the context of articles 16 and 24 and deferred consideration of the matter until it had discussed those articles (see para. 167).

Article 7. Party autonomy

119. The text of draft article 7 as considered by the Commission was as follows:

> "The assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement."

120. The Commission noted that the draft article was modelled on article 6 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980; "the United Nations Sales Convention"). It was also noted, however, that, unlike article 6 of the United Nations Sales Convention, article 7 of the draft UNCITRAL convention did not allow parties to vary or derogate from provisions that affected the legal position of third parties or to exclude the Convention as a whole. The reason for that different approach was said to be that, while the United Nations Sales Convention dealt with the mutual rights and obligations of the seller and the buyer, the draft UNCITRAL convention dealt mainly with the proprietary effects of assignment and could, therefore, have an impact on the legal position of the debtor and other third parties. The Commission proceeded to consider article 7 on the understanding that agreements between the assignee and the debtor would not be covered by the convention (see A/CN.9/470, para. 150). A suggestion to revise article 7 so as to allow the parties to exclude the application of the convention altogether did not receive support. In the discussion, some doubt was expressed as to whether a choice by the parties of the law of a non-contracting State would always result in excluding the application of the convention.

121. The Commission decided that language should be added to the article to clarify that it did not empower the parties to derogate from the provisions of article 21, which limited the scope of waivers of defences that might be agreed by the debtor and the assignor. It was stated that a similar reference might need to be made to other provisions of the draft convention so as to ensure that consumer-protection legislation would not be interfered with (as regards consumer protection, see paras. 170-172). Deferring a final decision on the matter to a later stage and subject to inclusion of a reference to article 21 in article 7, the Commission approved the substance of article 7 and referred it to the drafting group.

Article 8. Principles of interpretation

122. The text of draft article 8 as considered by the Commission was as follows:

"1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

"2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

123. It was proposed that paragraph 1 expressly mention the preamble to the convention among the elements that should be taken into account in the interpretation of the convention. The formulation "[regard is to be had] to its object and purpose as set forth in the preamble" was proposed (see article 4, paragraph 1, of the Unidroit Convention on International Factoring, Ottawa, 1988, "the Ottawa Convention"). Subject to that change, the Commission approved the substance of paragraph 1 and referred it to the drafting group.

124. With regard to paragraph 2, the suggestion was made that it might need to be revised to ensure that the law applicable by virtue of the private international law rules of the convention was to be applied first and then, only as necessary, the law applicable by virtue of the rules of private international law of the forum. It was also generally considered that the possibility of applying general principles or the law applicable by virtue of the rules of private international law extended only to the substantive law part of the convention and not to chapter V. Noting that the interplay between article 7 and chapter V would depend on the scope and purpose of chapter V, a matter that would need to be considered by the Commission, the Commission postponed a decision on the matter until it had finalized chapter V.

Chapter III. Effects of assignment

Form of assignment

125. The Commission noted that the draft convention did not settle the issue of the form of assignment. It was noted that failure to address the matter could create difficulties or uncertainty as to the validity of an assignment. An assignee under the convention would need to establish the formal validity of an assignment under law outside the convention (without having a clear indication as to which law might apply), the material validity of an assignment partly under the convention and partly under other law outside the convention and priority under the law of the assignor's location. Such a result could have a negative impact on the cost of credit. It was also noted that failing to address the issue of form in the convention would raise uncertainty as to whether the convention intended the matter to be referred to law applicable outside the convention or to be settled in favour of the principle that no form was required (*favor cessionis*), a result that was said to be inconsistent with the policy underlying the decision of the Working Group not to address the issue of form. Furthermore, it was noted that identifying the law applicable to the form of assignment might be difficult. In that connection, the example was given of article 9 of the Convention on the Law Applicable to Contractual Obligations (Rome, 1980), where it was not clear whether it provided a solution also for the form of assignment

as a transfer (at least for those jurisdictions where a clear distinction was drawn between the contract to assign and the assignment itself).

126. Some support was expressed for the position that no provision on form requirement should be included in the draft convention. It was stated that a number of issues regarding the contract of assignment had been left out of the draft convention and that, in view of the difficulties in finding an agreed solution on form requirements, it was preferable not to deal with the issue at all. It was also observed that, to the extent that it was not clear that the form of assignment was outside the scope of the convention, the matter should be clarified in a commentary.

127. The prevailing view, however, was that, in order to avoid difficulties (noted above in para. 125), it was advisable to resolve the issue of form (of the contract of the assignment and the assignment itself). It was considered that it would not be possible to reach consensus on a uniform form requirement or on a uniform private international law rule that would determine the law governing form requirements. However, there was broad support for providing a "safe-harbour" type of rule that would give the parties the certainty that, if they complied with the form requirement of the law of the assignor's location, the assignment would not be invalidated for failing to meet the form requirements of the law that would otherwise apply. Such a safe-harbour rule would refer form to a single and easily identifiable jurisdiction without necessarily restricting the parties to the form requirements of one law, but would leave them the choice of following the form requirements of either the law that (according to the rules of private international law) governed form or of the law specified in the convention.

128. A suggestion was made to define what was meant by "form". According to one view, the concept should be understood broadly and should cover not only the narrow issue of whether the assignment should be recorded in a written or electronic form, but also issues such as whether the assignment should be registered and whether and how the debtor should be notified of the assignment. The prevailing view, however, was that the draft convention should not attempt to define the requirements that fell within the notion of form and that, in any case, for a safe-harbour rule it was not necessary to define in a uniform manner the notion of form.

129. The Commission considered several proposals for the formulation of a safe-harbour rule. One proposal read as follows: "An assignment shall be considered formally valid if it meets, at least, the formal requirements of the law of the State in which the assignor is located" (see A/CN.9/470, para. 82). That proposal did not attract sufficient support, since it could be misunderstood as providing a uniform rule on the form requirement. Another proposal read: "Without prejudice to the formal validity of the assignment on the grounds of any other applicable law, an assignment is [effective] [formally valid] if it meets the form requirement of the law of the State in which the assignor is located." There was no support for that proposal either, since the requirements referred to might be applicable "subject to" (i.e. cumulatively with) the form requirements of the law applicable by virtue of the rules of private international law. Having reiterated its intention to provide a safe-harbour rule (which should pursue the principle *in favorem negotii* to the extent possible), the Commission decided that a safe-harbour rule should be included in the draft convention, referring form either to the law applicable by virtue of the rules of private international law or to the law of the assignor's location. The precise formulation of that rule was referred to the drafting group.

Article 9. Effectiveness of bulk assignments, assignments of future receivables and partial assignments

130. The text of draft article 9 as considered by the Commission was as follows:

> "1. An assignment of existing or future, one or more, receivables and parts of, or undivided interests in, receivables is effective, whether the receivables are described:
>
> "(a) Individually as receivables to which the assignment relates; or
>
> "(b) In any other manner, provided that they can, at the time of the assignment, or, in the case of future receivables, at the time of the conclusion of the original contract, be identified as receivables to which the assignment relates.
>
> "2. Unless otherwise agreed, an assignment of one or more future receivables is effective at the time of the conclusion of the original contract without a new act of transfer being required to assign each receivable."

Paragraph 1

131. It was noted that article 9 was not intended to override statutory limitations other than those referred to in paragraph 1. The Commission agreed that that understanding needed to be reflected explicitly in article 9. The following language was proposed: "This Convention does not affect any statutory limitations on assignment other than those referred to in article 9" (see A/CN.9/470, para. 85). It was stated that the proposed language should be expanded to cover statutory limitations giving effect to contractual limitations on assignment of receivables and of rights securing receivables. The following text was proposed:

> "This article is subject to any applicable statute, other than a statute of the type described in paragraph 4 [*of the text proposed in A/CN.9/472/Add.3, p. 12*], that prohibits or limits the assignment of a receivable for a reason other than the existence of a contractual prohibition or limitation of such assignment."

132. It was also noted that article 9 dealt with the effectiveness of an assignment as between the assignor and the assignee and as against the debtor, while the effectiveness as against third parties other than the debtor (i.e. priority) was governed by the law applicable under article 24. It was agreed that article 9 should be appropriately amended to reflect that distinction between effectiveness and priority, in particular for the sake of clarity in the application of the convention in those jurisdictions in which such a distinction was not known. It was also agreed that article 9 should make it clear that it was not intended to supplant the rules of priority of the law applicable or to allow prohibitions on bulk assignments or on assignments of future receivables to come through the back door through the use of a priority rule applicable under articles 24-27. In order to reflect that agreement, it was proposed that the wording of paragraph 1 make it clear that it applied to effectiveness as between the assignor and the assignee and as against the debtor. Similarly, the proposal was made that a new paragraph be inserted in article 9 to read: "A transfer of a receivable is effective, as between the assignor and the assignee, at the time of transfer" (see A/CN.9/472/Add.3, p. 12). It was agreed that

the wording should make it clear that the assignment was effective as against the debtor as well.

133. In addition, it was proposed (see A/CN.9/470, para. 88) that a new paragraph be added to article 9 to read:

> "The effectiveness of an assignment of receivables referred to in paragraphs 1 and 2 of this article as against third parties other than the debtor is governed by the law applicable under article 24. However, such an assignment is not ineffective as against such third parties on the sole ground that the law of the assignor's location does not recognize its effectiveness."

While there was general agreement on the principle embodied in the proposed text, it was stated that the first sentence might not be necessary since it repeated the rule reflected in article 24, while the second sentence might go too far in that it might affect rules of insolvency law as to the effectiveness of an assignment of receivables arising after the commencement of an insolvency proceeding with respect to the assets and the affairs of the assignor. In order to address that matter as well, the following text was proposed:

> "A transfer of a receivable is not ineffective against, and may not be subordinated to, a person described in subparagraph (a) of article 24, solely because law other than this Convention does not *generally* recognize an assignment described in paragraph 1 or 2."

It was also proposed (see A/CN.9/472/Add.3, p. 12) that one more additional paragraph be added to article 9 to read: "*Except as otherwise provided in this article*, whether a transfer of a receivable affects the rights of a person described in subparagraph (a) of article 24 is determined in accordance with section III of chapter IV."

134. Subject to the changes mentioned in the preceding paragraphs, the exact formulation of which was referred to the drafting group, the Commission approved the substance of paragraph 1.

Paragraph 2

135. It was noted that, as a result of the substitution of the words "at the time of the conclusion of the original contract" for the word "arises", made by the Working Group at its thirty-first session, paragraph 2 appeared to address the issue of the time of assignment in a way that was inconsistent with article 10. It was noted that paragraph 2 was not intended to deal with that matter but only with the validity of master agreements covering a multiplicity of present and future receivables. It was therefore agreed that the words "at the time of the conclusion of the original contract" should be deleted. Subject to that change, the Commission approved the substance of paragraph 2 and referred it to the drafting group.

Article 10. Time of assignment

136. The text of draft article 10 as considered by the Commission was as follows:

> "An existing receivable is transferred, and a future receivable is deemed to be transferred, at the time of the conclusion of the contract of assignment, unless the assignor and the assignee have specified a later time."

137. The concern was expressed that articles 9 and 10 could be read as overriding the domestic insolvency law of the assignor's jurisdiction regarding priorities with respect to receivables arising after the commencement of the insolvency proceeding or earned after the commencement of the insolvency proceeding by the use of unencumbered assets of the insolvency estate. Such an interpretation could arise from the fact that article 24 explicitly stated that it did not cover "matters which are settled elsewhere in this Convention" and article 10 contained no explicit wording as to whether it was intended to affect the rights of third parties.

138. There was general agreement that the question of the extent to which an assigned receivable arising or being earned after the commencement of the insolvency proceeding should be subject to the applicable insolvency law (on this matter, see also para. 133). Subject to that change, the exact formulation of which was referred to the drafting group, the Commission approved the substance of article 10.

Article 11. Contractual limitations on assignment

139. The text of draft article 11 as discussed by the Commission was as follows:

> "1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables.
>
> "2. Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement. A person who is not party to such an agreement is not liable on the sole ground that it had knowledge of the agreement."

General policy

140. The view was expressed that article 11 ran counter to the principle of party autonomy and should therefore be deleted or made subject to a reservation by States. There was not sufficient support for that view in the Commission. It was widely felt that the underlying policy of article 11 should be approved. Article 11 was an essential provision agreed upon by the Working Group after a long debate. In addition, it was observed that it was more beneficial for everyone to facilitate the assignment of receivables and to reduce transaction costs rather than to ensure that the debtor would not have to pay a person other than the original creditor. It was also stated that the goal of the draft convention, which was to increase the availability of credit at more affordable rates, could not be achieved without some adjustments in national legislation that would be aimed at accommodating modern commercial practices. After discussion, the Commission approved the overall policy underlying article 11 and decided that it should be retained (subject to the changes described in paras. 144 and 151).

Avoidance of contract on the sole ground of breach of anti-assignment agreement

141. Differing views were expressed as to whether the debtor should be able to declare the original contract avoided on the sole ground of breach of the agreement limiting the assignment of receivables in any way ("anti-assignment agreement"), if the debtor had such a right under law applicable outside the convention. One view was that the convention should not interfere with the debtor's right to avoid the

original contract for breach of any anti-assignment agreement. It was stated that such an approach was not necessary since avoidance of the original contract could not affect any rights acquired under that contract. In addition, it was observed that such an approach would inadvertently result in overprotecting, without any reason, not only the assignee but also the assignor, despite the fact that the assignor would have committed a breach of contract.

142. The prevailing view, however, was that, unless the debtor was precluded from declaring the original contract avoided on the sole ground that the assignor had violated an anti-assignment agreement, articles 11 and 20, paragraph 3, would be deprived of any meaning (those provisions validated an assignment made in breach of an anti-assignment agreement and precluded the debtor from raising against the assignee any right the debtor might have as against the assignor as a result of the breach of the anti-assignment agreement). In addition it was stated that if after notification the debtor could not do the minimum, namely modify the original contract without the actual or constructive consent of the assignee, the debtor should not be entitled to do the maximum, namely to avoid the original contract. Moreover, it was pointed out that, if the original contract were to be avoided, the assignee could find itself in a position of having advanced financing to the assignor while being unable to rely on payment by the debtor.

143. For that reason, the suggestions to exclude the debtor's avoidance rights with respect to all contracts except long-term contracts and future receivables or to leave paragraph 2 unchanged and to include an explanation of the matter in a commentary were not supported. Another suggestion to include in the text of article 11 or in a commentary to the convention the clarification that the avoidance of the original contract did not affect the debtor's acquired rights did not attract sufficient support either. It was widely felt that if the debtor avoided the original contract, the assignee's rights were bound to be affected. Another suggestion to limit the debtor's right to avoid the original contract for breach of an anti-assignment agreement to cases in which a material breach was involved also did not attract sufficient support. It was widely felt that such an approach would introduce uncertainty, since it might not always be clear what types of conduct constituted a material breach of contract. In any case, such an approach would not be sufficient to protect the assignee, since any type of breach could be defined in the original contract as being a material breach. It was generally agreed that any uncertainty with regard to that matter could inadvertently result in failing to cover the risk of contract avoidance and thus in defeating a transaction or in raising the cost of credit for the assignor and the debtor. Yet another suggestion to preclude the debtor from avoiding the original contract, unless the assignment "materially impaired the debtor's ability to obtain performance", was met with interest. It was proposed that language be included in paragraph 2 to implement that suggestion and to preclude the parties from defining the breach of an anti-assignment clause as a material impairment of the debtor's ability to obtain performance. An objection was raised with regard to the inclusion of the proposed text in article 11 on the ground that it might inadvertently be interpreted as implying that the convention affected non-monetary performance rights. It was agreed, however, that a commentary to the convention could clarify that an assignment under the convention could not affect any non-monetary performance rights of the debtor.

144. After discussion, the Commission agreed that paragraph 2 should be revised to preclude the debtor from avoiding the original contract on the sole ground that the assignor had made an assignment in violation of an anti-assignment agreement. It was also agreed that the same rule should apply with respect to anti-assignment agreements in assignments or subsequent assignments. Furthermore, it was agreed that the debtor's right to compensation should not be limited in any way. Subject to that change, the Commission approved the substance of paragraph 2 and referred it to the drafting group.

Scope of articles 11 and 12

145. Recalling its earlier discussion on the scope of articles 11 and 12 (see paras. 104-107), the Commission considered a suggestion to limit the scope of application of article 11 to those practices for which articles 11 and 12, paragraphs 2 and 3, would be suitable. Language along the following lines was proposed for inclusion in a new paragraph 3 of article 11 and after paragraph 3 of article 12:

"This article applies only to receivables:

"(a) Arising under an original contract for the sale or lease of goods or the provision of services other than financial services;

"(b) Arising under an original contract for the sale, lease or licence of industrial or other intellectual property or other information; or

"(c) Representing the payment obligation for a credit card transaction."

146. It was stated that under the proposed approach the effect of an anti-assignment agreement with respect to practices not mentioned in the proposed list would be left to law outside the convention. If that law gave effect to anti-assignment agreements, the assignment would be ineffective and thus the convention would not apply. It was observed that such an approach would make a restrictive definition of "receivable" in article 2 unnecessary and it would also make article 5 superfluous.

147. While broad support was voiced in the Commission for the proposed limitation of the scope of articles 11 and 12, paragraphs 2 and 3 (and thus of the convention), concern was expressed that the proposed approach would overly limit the scope of the convention.

148. A question was also raised as to whether "goods" would include immovable property. In response, it was observed that "goods" was meant to denote only movable tangible property and would therefore not include land or buildings or goods permanently fixed into land or buildings. The suggestion was therefore made that in subparagraph (a) of the proposed text reference should also be made to receivables arising from the sale or lease of real estate. In support, it was stated that there was no reason to exclude from the scope of application of articles 11 and 12, paragraphs 2 and 3, assignments of receivables arising from real estate transactions. Such an exclusion was not necessary, in particular, after the addition of a provision in article 4 aimed at protecting interests held under the law of the country in which the real estate was located. A note of caution was struck, however, that such an approach might have a negative effect on the acceptability of the convention. In response, it was pointed out that the inclusion of the proposed addition would highlight the matter and facilitate consultation with the relevant industry. After discussion, the Commission approved the proposed addition.

149. Recalling its earlier decision to exclude financial netting agreements from the scope of the draft convention as a whole (see paras. 46-48), the Commission resumed its discussion on whether industrial netting agreements should be excluded from the scope of articles 11 and 12. The suggestion was made that the assignment of receivables arising from non-financial contracts governed by netting agreements should be excluded from the scope of the two articles. Objections were raised with regard to that suggestion on the ground that such an approach could inadvertently result in excluding the assignment of a wide range of receivables merely because the assignor and the debtor had included in their original contract a clause about payment by way of set-off. It was considered that the convention should not sanction such set-off agreements, which were routinely made and were aimed at defrauding assignees. It was stated that such an approach was not necessary, since receivables from industrial netting arrangements between chambers of commerce were normally not assigned. The suggestion was made that the matter could be addressed in article 20, dealing with rights of set-off. However, it was stated that industrial netting arrangements could be preserved, without excluding from the convention important trade practices, if the application of articles 11 and 12 were to be limited to the net debt owed after the settlement of mutual debts governed by a netting agreement contained in an original contract. It was also observed that the net balance owed after the settlement of mutual obligations to the parties to a netting agreement was a new receivable arising by novation. It was pointed out that a netting agreement, under the definition adopted by the Commission, should be understood as an arrangement among, at least, three or more parties (see paras. 73 and 74). Some doubt was expressed as to whether the definition of "netting agreement" made it sufficiently clear that at least three parties were required. However, it was widely felt that the definition was sufficiently clear and should not be changed, in particular, since in some jurisdictions netting arrangements could involve only two parties. The following text was proposed for addition either in articles 11 and 12 or in article 4:

> "In the case of receivables arising under contracts governed by netting agreements, articles 11 and 12, paragraphs 2 and 3, apply only to the assignment of a receivable owed to the assignor upon net settlement of payments due pursuant to the netting agreement."

There was broad support for that suggestion.

150. The suggestion was also made that articles 11 and 12, paragraphs 2 and 3, should apply "to other similar practices". That suggestion encountered an objection on the ground that it might create uncertainty as to the scope of application of the convention. Another suggestion was that in subparagraph (a) of the proposed text reference should be made also to construction, since in some jurisdictions the term "services" was not sufficient to include construction. Broad support was expressed in the Commission for that suggestion. Yet another suggestion was that a commentary to the convention should explain that "financial services" included factoring and invoice discounting, even if those practices involved services that were not financial in a strict sense, such as insurance, bookkeeping or debt-collection services. That suggestion also attracted sufficient support.

151. After discussion, the Commission approved the substance of the proposed addition to articles 11 and 12, as revised to refer to real estate receivables, industrial netting and construction (see paras. 148-150) and referred it to the drafting group. In

line with that decision, the Commission decided that articles 5 and 6, subparagraph (1), should be deleted.

Further practices to be excluded

152. After completing its discussion on the scope of articles 11 and 12, the Commission reverted to the question whether States should be allowed to exclude further practices from the scope of the convention (see articles 4, para. 2, and 39, as well as paras. 32 and 109). There was strong support for the deletion of articles 4, paragraph 2, and 39. It was widely felt that, once the scope of the convention had been defined in a detailed and restrictive way, all scope-related concerns would have been addressed and therefore there was no need to allow further exclusions. It was also widely felt that allowing further exclusions on a State-by-State basis would run counter to the goal of the convention to achieve uniformity and certainty. However, the concern was expressed that deletion of articles 4, paragraph 2, and 39 might reduce the acceptability of the convention. It was also stated that it would be premature to delete article 4, paragraph 2, before the Commission had made a final decision with respect to all scope-related issues and the final provisions in their entirety. For that reason, the Commission deferred final decision on draft articles 4, paragraph 2, and 39 until it had finalized the draft convention as a whole.

Article 12. Transfer of security rights

153. The text of draft article 12 as considered by the Commission was as follows:

> "1. A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer, unless, under the law governing the right, it is transferable only with a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer this right and any proceeds to the assignee.
>
> "2. A right securing payment of the assigned receivable is transferred under paragraph 1 of this article notwithstanding an agreement between the assignor and the debtor or other person granting the right, limiting in any way the assignor's right to assign the receivable or the right securing payment of the assigned receivable.
>
> "3. Nothing in this article affects any obligation or liability of the assignor for breach of an agreement under paragraph 2 of this article. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.
>
> "4. The transfer of a possessory property right under paragraph 1 of this article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.
>
> "5. Paragraph 1 of this article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any rights securing payment of the assigned receivable."

Paragraph 1

154. The Commission noted that the second part of the first sentence of paragraph 1 repeated in effect the second sentence of paragraph 1 and should therefore be deleted. Subject to that change, the Commission approved the substance of paragraph 1 and referred it to the drafting group.

Paragraphs 2 and 3

155. Recalling its decision that the debtor should not be able to declare the original contract avoided on the sole ground that the assignor violated an anti-assignment clause (see para. 144), the Commission decided that the same rule should apply with respect to a breach of an agreement to assign a right securing payment of a receivable. Subject to that change in paragraph 2, the Commission approved the substance of paragraphs 2 and 3 and referred them to the drafting group.

156. The Commission also recalled its decision with respect to the scope of article 11 (see para. 151) and decided that paragraphs 2 and 3, which followed the language of article 11, should have the same scope as article 11. It was therefore decided that a new paragraph dealing with the scope of paragraphs 2 and 3 along the lines of the scope provision in article 11 should be inserted as paragraph 4 of article 12.

Paragraphs 4 and 5

157. The Commission approved the substance of paragraphs 4 and 5 unchanged. It was noted that paragraph 5 was consistent, and did not need to be aligned, with the new safe-haven rule on the form of assignment. As a result of a combined application of the new rule and article 12, paragraph 5, the form of assignment would be subject to the law of the assignor's location (or any other applicable law), while the form of the transfer of a right securing payment of the assigned receivable would be subject to the law governing that right.

Chapter IV. Rights, obligations and defences

Section I. Assignor and assignee

Article 13. Rights and obligations of the assignor and the assignee

158. The text of draft article 13 as considered by the Commission was as follows:

> "1. The rights and obligations of the assignor and the assignee as between them arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.
>
> "2. The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices which they have established between themselves.
>
> "3. In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, to have impliedly made applicable to the assignment a usage which in international trade is widely known to, and regularly observed by, parties to the particular [receivables financing] practice."

159. It was noted that, in view of the fact that party autonomy was broadly recognized in paragraph 1, parties would always have the right to agree otherwise as to the binding nature of practices established between themselves. As a result, it was noted, the words "unless otherwise agreed" in paragraph 2 were not necessary. It was also noted that those words might raise questions of interpretation, since the equivalent provision in article 9, paragraph 1, of the United Nations Sales Convention did not contain such wording. The Commission agreed, however, that the matter was sufficiently clear and decided to retain the words "unless otherwise agreed", since the reference to practices might otherwise create uncertainty.

160. It was noted that, after the limitation of article 13 to the mutual rights and obligations of the parties, the reason for departing in paragraph 5 from the wording of the equivalent provision of the United Nations Sales Convention (article 9, paragraph 2) had ceased to exist and therefore reference to what the parties knew or ought to have known would not create any problems for third parties. However, the Commission agreed that paragraph 5 was satisfactory in its current formulation.

161. After discussion, the Commission approved the substance of article 13 unchanged and referred it to the drafting group. Pending final determination of the title, the preamble and article 6 (c), the Commission deferred a decision with regard to the words "receivables financing" in paragraph 3 (see para. 184).

Article 14. Representations of the assignor

162. The text of draft article 14 as considered by the Commission was as follows:

> "1. Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of the conclusion of the contract of assignment that:
>
> "(a) The assignor has the right to assign the receivable;
>
> "(b) The assignor has not previously assigned the receivable to another assignee; and
>
> "(c) The debtor does not and will not have any defences or rights of set-off.
>
> "2. Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the financial ability to pay."

163. The Commission approved the substance of article 14 unchanged and referred it to the drafting group. It was widely felt that paragraph 1 (a) was sufficient to cover all representations relating to the existence of the receivable, since, if the receivable did not exist or was subject to a statutory limitation, the assignor would not have the right to assign it. It was also generally agreed that it was not necessary to add representations as to the non-modification of the original contract after notification, without the actual or constructive consent of the assignee, or to the transfer of any independent security or other supporting rights by the assignor to the assignee, since those matters were sufficiently covered by party autonomy and draft articles 12, paragraph 1, and 22, paragraph 2.

Article 15. Right to notify the debtor

164. The text of draft article 15 as considered by the Commission was as follows:

"1. Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor a notification of the assignment and a payment instruction, but after notification is sent only the assignee may send a payment instruction.

"2. A notification of the assignment or payment instruction sent in breach of any agreement referred to in paragraph 1 of this article is not ineffective for the purposes of article 19 by reason of such breach. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach."

165. The Commission approved the substance of article 15 unchanged and referred it to the drafting group.

Article 16. Right to payment

166. The text of draft article 16 as considered by the Commission was as follows:

"1. As between the assignor and the assignee, unless otherwise agreed, and whether or not a notification of the assignment has been sent:

"(a) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;

"(b) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and is also entitled to goods returned to the assignor in respect of the assigned receivable; and

"(c) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and is also entitled to goods returned to such person in respect of the assigned receivable.

"2. The assignee may not retain more than the value of its right in the receivable."

167. The Commission approved the substance of article 16 unchanged. It was agreed that the draft article properly covered proceeds, including returned goods, and that the definition of proceeds should be reviewed in the context of articles 24 and 26.

Section II. Debtor

Article 17. Principle of debtor protection

168. The text of draft article 17 as considered by the Commission was as follows:

"1. Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.

"2. A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not:

"(a) Change the currency of payment specified in the original contract; or

"(b) Change the State specified in the original contract, in which payment is to be made, to a State other than that in which the debtor is located."

Change of country of payment

169. The Commission considered whether any change of the country of payment, even to the country in which the debtor was located, should be subject to the debtor's consent. It was stated that paragraph 2 (b) was sufficient to cover the vast majority of cases, in which payment in the debtor's country, instead of in the country of a foreign assignor, would be agreeable to the debtor. It was also observed that such an approach appropriately reflected a good practice, in particular, in international factoring contracts, and the convention should avoid casting any doubt on that practice. In addition, it was observed that the convention did not need to address the very special cases in which a debtor might prefer to pay in a foreign country. On the other hand, it was stated that any change to the country of payment should be subject to the debtor's consent, since the debtor might have good reasons for agreeing in the original contract to pay in a foreign country. In addition, it was stated that, if the assignee and the debtor were to be able to change by agreement the country of payment, they should also be able to change the currency of payment. On the understanding that agreements between assignees and debtors fell outside the scope of the convention, the Commission decided that no change was necessary in paragraph 2.

Consumer protection

170. It was noted that a principle flowing from article 17 was that the convention was not intended to affect adversely the legal position of consumer debtors. It was also noted that that general principle was also reflected in articles 1, paragraph 2 (which provided that the convention would not affect the debtor's legal position unless the debtor was located in a contracting State or the law governing the receivable was the law of a contracting State), 9 as revised (which made clear that the convention was not intended to affect limitations on assignment imposed by law, other than those referred to in article 9), 19 (which allowed the debtor to discharge its obligation under law outside the convention), 20 (which preserved the debtor's defences and rights of set-off, with the exception of rights of set-off arising from unrelated contracts and not available at the time of notification), 21 and 23 (which made explicit reference to consumer protection law) and 22 (which allowed a modification of the original contract, even after notification, with the constructive consent of the assignee).

171. The view was expressed that, in order to avoid any doubt, the above-mentioned understanding should be explicitly mentioned in article 17. It was stated that consumer protection legislation reflected public policy, at both the national level and the supranational level, with which the convention could not and should not interfere. It was stated that such legislation was aimed at protecting consumer debtors, in view of the fact that they normally did not have the bargaining power to

protect their interests, and it could not be derogated from by agreement of the parties since it was of a mandatory nature. In addition, clauses involving implicit consent by the consumer could be interpreted as abusive clauses prohibited by rules of law enacted under international agreements on regional integration. The following language was proposed for addition to article 17 (see A/CN.9/472, p. 10): "This Convention does not prejudice the laws of the State in which the debtor is located governing the protection of the debtor in transactions made for personal, family or household purposes."

172. Objections were raised with regard to the above-mentioned suggestion. It was stated that the proposed wording was unnecessary, since the draft convention already contained appropriate provisions protecting the interests of consumer debtors. It was also observed that the proposed wording might raise questions of interpretation or even invite courts to invalidate assignments on obscure or artificial grounds, a result that could undermine the availability or the cost of consumer credit. On the other hand, it was pointed out that the difference between the positions reflected above might not be so significant. In that vein, it was suggested that the wording of article 17 should make it clear that the draft convention would not permit a consumer debtor to vary or derogate from the original contract if the derogation or variation was not permitted by consumer-protection legislation in the State in which the debtor was located. While some support was expressed for that suggestion, the Commission approved the substance of article 17 unchanged and referred it to the drafting group, on the understanding that it might have to reconsider the matter.

Legal position of the debtor in the case of a partial assignment

173. It was recalled that the Commission had decided to postpone discussion of the legal position of the debtor in the case of one or more notifications with respect to a partial assignment until it had a chance to consider the debtor-related provisions (see para. 20). The view was expressed that the matter should be dealt with in article 17. However, the Commission did not have sufficient time to consider the matter (see paras. 180 and 185).

Chapter V. Conflict of laws

174. The Commission heard a statement on behalf of the Permanent Bureau of the Hague Conference on Private International Law, which was aimed at ensuring close cooperation with UNCITRAL. It was recalled that a joint group of UNCITRAL and Hague Conference experts had met in The Hague from 18 to 20 May 1998 and that subsequently the Permanent Bureau of the Hague Conference had submitted a report dated 10 July 1998 containing several recommendations to the relevant UNCITRAL Working Group (A/CN.9/WG.II/WP.99). It was observed that, while articles 24-27 did not fully implement the recommendations contained in the report by the Permanent Bureau, they were in principle entirely satisfactory.

175. With regard to chapter V, it was pointed out that, if adopted with a broader scope than that of the convention (i.e. as a "mini-convention"), it might be in conflict with regional texts, such as the European Union Convention on the Law Applicable to Contractual Obligations (Rome, 1980; "the Rome Convention"). In that connection, it was pointed out that draft article 28 departed from article 12 of

the Rome Convention in two respects: it required an explicit choice of law and created a rebuttable presumption in favour of the law of the assignor's location as the law most closely connected to the contract of assignment. It was also observed that, in principle, it would not be appropriate to subject the application of chapter V to the notion of internationality of the substantive law part of the draft convention. However, if that approach were to be confirmed by the Commission, draft article 28, paragraph 3 (precluding the application of a foreign law chosen by the parties to a domestic assignment of domestic receivables), might not be necessary, since, if an assignment were not international under draft article 3, chapter V would not apply. With regard to draft articles 30-32, some doubt was expressed as to whether they were necessary. It was also observed that draft article 30, paragraph 2, appeared to repeat the rule contained in draft article 32. In addition, it was stated that the issue of the scope of chapter V and the hierarchy between chapter V and the rest of the draft convention would need to be resolved in a separate article, as suggested by the UNCITRAL secretariat (see A/CN.9/470, para. 22). Moreover, the issue of *renvoi* would need to be resolved by way of a provision in chapter V, since, if chapter V were to have a broader scope of application than the rest of the draft convention, draft article 6 (j) (which was intended to address the issue of *renvoi*) would not apply.

176. In response, it was stated that chapter V might not be a "mini-convention" and, if it were to become one, articles 28 and 29 might need to be redrafted and a provision on *renvoi* might need to be included in chapter V. It was also observed that, if chapter V applied to assignments with an international element as defined in article 3, article 28, paragraph 3, would not be necessary.

177. The Commission was also informed of a proposal presented to the Special Commission on general affairs and policy of the Conference at its meeting held in The Hague from 8 to 12 May 2000, for the Hague Conference to prepare a draft convention on the law applicable to security interests in investment securities. It was stated that close cooperation with UNCITRAL would be particularly welcome, in view of the Commission's work on assignment of receivables and the possibility of UNCITRAL undertaking further work in the future in the field of secured credit law.

178. The Commission expressed its appreciation to the observer for the Permanent Bureau of the Hague Conference and deferred discussion on chapter V until it had finalized the substantive law part of the draft convention. Discussion on possible future work in the field of secured credit law was postponed until the Commission had considered agenda item 16, "Coordination and cooperation" (see paras. 455–463).

C. Report of the drafting group

179. The Commission requested a drafting group established by the Secretariat to review articles 1-17 of the draft convention, with a view to ensuring consistency between the various language versions.

180. At the close of its deliberations on the draft convention, the Commission considered the report of the drafting group and adopted articles 1-17 of the draft convention, as revised by the drafting group, with the exception of the bracketed

language in those provisions and of article 1, paragraph 5, which was left to be considered in the context of a discussion on draft article 40 and the annex to the draft convention. Article 7, paragraph 2 (article 8 in the text of the draft convention considered by the Commission), was adopted subject to consideration of the question of its relationship with chapter V. Article 17 was adopted subject to consideration of whether the issue of the legal position of the debtor in the case of a partial assignment should be explicitly addressed in article 17, a question which the Commission did not have sufficient time to consider (see paras. 20, 173 and 185).

181. In the context of the discussion of the report of the drafting group, the Commission decided that the title of the convention should read: "Convention on Assignment of Receivables in International Trade". It was widely felt that any reference to "receivables financing" would be inconsistent with the scope of the convention, which went beyond purely financing transactions. In the discussion, the suggestion was made that the words "in International Trade" should be deleted, since they were not necessary and might be misleading to the extent that they suggested that only the assignment of trade receivables was covered. It was agreed that those words could be retained, while a commentary to the convention could explain that the term "international trade" was used in the widest possible sense and that in any case it was intended to include trade, financial and consumer transactions.

182. Following up on its decision to delete the reference to "receivables financing" in the title of the convention, the Commission decided to delete any reference to financing in the preamble. With regard to the second preambular paragraph, it was decided that reference should be made to uncertainties constituting an obstacle to international trade. As to the third preambular paragraph, while some support was expressed for the retention of the indicative list of practices, it was decided that the list should be deleted, since it was bound to be incomplete and could soon become outdated. It was also agreed that the main practices to be covered by the convention should be highlighted at the beginning of a commentary to the convention. With regard to the fourth preambular paragraph, the suggestion was made that it should include a reference to the preservation of national law, in particular with regard to preferential rights and rights in real estate. It was agreed that the reference to the preservation of the debtor's rights was sufficient in that respect and that a commentary could further explain the types of debtor's rights and the kind of laws intended to be preserved. It was noted that such an approach would be consistent with the approach taken in the preamble to the UNCITRAL Model Law on Cross-Border Insolvency. As to the fifth preambular paragraph, it was agreed that the reference to "capital and credit" should be retained so as to clarify that the convention was intended to cover both outright assignments (in which capital was made available) and assignments by way of security (in which credit was made available). It was also agreed that reference should be made first to the availability of capital and credit and then to international trade.

183. After discussion, the Commission decided that the preamble should read as follows:

"*The Contracting States*,

"*Reaffirming their conviction* that international trade on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,

"*Considering* that problems created by the uncertainties as to the content and the choice of legal regime applicable to assignments of receivables constitute an obstacle to international trade,

"*Desiring* to establish principles and adopt rules relating to the assignment of receivables that would create certainty and transparency and promote modernization of law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices,

"*Desiring also* to ensure the adequate protection of the interests of the debtor in the case of an assignment of receivables,

"*Being of the opinion* that the adoption of uniform rules governing assignments of receivables would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international trade,

"*Have agreed* as follows:"

184. In line with its decision to delete any references to "receivables financing" in the title and the preamble to the convention, the Commission decided that article 6, subparagraph (c), and the reference to "receivables financing" in article 13, paragraph 3, should also be deleted.

185. In view of the fact that, under article 2, the scope of the convention would be limited to contractual receivables, it was stated that the question whether States should be given a right to apply the convention to additional practices (e.g. to assignments of non-contractual receivables) should be reconsidered in the context of the final provisions. With respect to draft article 4, paragraph 1 (b), it was agreed that the words "to the extent" should be deleted. As to draft article 4, paragraph 3 (a) and (b), it was agreed that the subparagraphs should be merged, reference should be made to competing rights and the word "or" after subparagraph (b) should be deleted. As to draft article 4, paragraph 2 (f), it was suggested that the French version should refer to "*valeurs mobiliers*". With respect to draft articles 11, paragraph 3 (a), and 12, paragraph 4 (a), it was agreed that the word "goods" should be placed in square brackets, pending a decision as to whether the word "goods" included intangible movable property. With respect to article 17, it was agreed that the question of the legal position of the debtor in the case of notifications relating to partial assignments remained to be addressed in the future (see also paras. 20, 173 and 180).

D. Future work on the draft convention

186. Having adopted the report of the drafting group, the Commission considered the steps to be taken for the completion of its work on the draft convention. A proposal was made and supported by several delegations that a resumed session of

the Commission should be convened for that purpose before the end of the year or early in 2001. This would have the advantage of allowing the Commission to complete its work in a timely fashion while avoiding sending the draft convention back to a working group and risking the reopening of matters already settled by the Commission. The prevailing view, however, was that the draft convention should be referred back to a working group. It was widely felt that such an approach would ensure the optimal use of the resources available to the Commission and allow it to complete its work on the draft convention in 2001 without having to change radically its schedule of meetings or general programme of work. It was stated that the changes made in articles 1-17 created a new situation, which would need to be reviewed by the Working Group on International Contract Practices. It was also observed that, in view of the Working Group's familiarity with the text, its expertise and efficiency, the draft convention could be advanced to a point where it could be swiftly adopted by the Commission at its 2001 session. In that connection, the Commission reaffirmed its confidence in the Working Group and expressed its appreciation for the remarkable work it had accomplished during the eight sessions devoted to the draft convention from November 1995 to October 1999.

187. As to the terms of reference of the Working Group, the Commission considered a proposal that read as follows:

> "1. Beginning with draft article 18, the Working Group should review those parts of the draft convention that the Commission has not had the opportunity to examine and text that remained within square brackets in draft articles 1-17.
>
> "2. In the light of modifications to draft articles 1-17, the Working Group should ensure that the coherence and consistency of the text are maintained.
>
> "3. If, as a result of its consideration of draft articles 18 of the draft convention to draft article 7 of the annex, the Working Group identifies issues in draft articles 1-17, it should bring those issues to the attention of the Commission with an appropriate explanation and recommendation, if possible.
>
> "4. As to its working methods, the Working Group should adopt the same approach as the Commission, that is, it should make only those changes that meet with substantial support."

188. Strong support was expressed for the proposal. It was widely felt that the proposed terms of reference would ensure that the mandate of the Working Group was both firm, ensuring that the Working Group would not change policy decisions made by the Commission, and flexible, allowing the Working Group to consider all issues not settled by the Commission and effect purely drafting changes in draft articles 1-17. In order to clarify the point that the Working Group should not reopen discussion on policy issues settled by the Commission, it was suggested that paragraphs 2 and 4 of the above-mentioned terms of reference should be prefaced by the words "In reviewing draft articles 18 of the draft convention to draft article 7 of the annex". However, it was agreed that that change was not necessary, since the current wording made it sufficiently clear that the Working Group did not have the mandate to effect any change in the policy decisions made by the Commission. If the Working Group identified any new policy issues relating to articles 1-17, it could only bring them to the attention of the Commission, making recommendations for their resolution by the Commission. On that basis, the Commission approved the

terms of reference mentioned above and referred the draft convention to a working group to be convened before the end of the year, with the request that the working group proceed with its work expeditiously so as to finalize the draft convention and submit it for adoption by the Commission at its next session, in 2001.

189. The Commission next considered the procedure for final adoption of the draft convention and opening for signature by States. The view was expressed that it would be premature for the Commission to consider the matter at the current session. The prevailing view, however, was that the Commission should inform the General Assembly of the possibility of the final adoption of the draft convention by the Assembly at its fifty-sixth session, in 2001, or by a diplomatic conference to be convened as soon as possible after the adoption of the draft convention by the Commission at its thirty-fourth session. Such a recommendation would allow the Sixth Committee of the General Assembly to consider the matter and take any necessary action. It would also allow the Fifth Committee to consider whether a diplomatic conference could be held within existing resources and thus keep open for the Commission the option of deciding at its thirty-fourth session to refer the draft convention to a diplomatic conference. It was understood that authorization of a diplomatic conference by the General Assembly would be subject, in addition to approval by the Fifth and Sixth Committees, to an offer by a Government to host the conference, accepting to bear the costs of changing the venue of the conference from Vienna, the seat of the secretariat of UNCITRAL, to a city in the host country. The Commission deferred a decision on the matter until it had considered a draft recommendation to the General Assembly (see para. 192).

190. The Commission next turned to the question whether a commentary should be prepared on the convention. It was noted that a commentary could be official, in which case it would need to be reviewed in detail and approved by the Commission, or unofficial, in which case it could be prepared by the Secretariat on the basis of general instructions given by the Commission. It was also noted that, regardless of whether the commentary were to be official or unofficial, the Commission would need to consider whether the purpose of the commentary would be to assist legislators in their consideration of the draft convention for adoption or users of the convention in the application and interpretation of it, or whether the commentary should be cast as both a legislative guide and a tool for interpretation. It was generally agreed that a commentary should be prepared by the Secretariat in order to assist legislators in considering the draft convention for adoption and users of the convention in interpreting and applying it. It was stated that the analytical commentary contained in the note by the Secretariat of 23 Mary 2000 (A/CN.9/470) could serve as an excellent basis for such a commentary, which, however, should be more concise and succinct. In response to a question, it was noted that it would be more efficient if the revised version of the commentary were to be prepared after the Working Group had completed its consideration of the draft convention, since otherwise the first part of the commentary, on articles 1-17, would probably need to be revised again after the Working Group had completed its work. In any case, it was widely felt that the Working Group would not have time to consider the commentary. It was agreed, however, that, if necessary, the Secretariat could prepare a note bringing to the attention of the Working Group any issues to be addressed by the Group.

191. After discussion, the Commission requested the Secretariat to prepare and distribute a revised version of the commentary on the convention after the Working

Group had completed its work on the draft convention (for the dates of the next session of the Working Group on International Contract Practices, see para. 369). It was agreed that the commentary should be concise and serve as an unofficial legislative guide and a tool for the interpretation of the convention. The Commission also requested the Secretariat to distribute for comments the text of the draft convention after the completion of the work of the Working Group to all States and interested international organizations, including non-governmental organizations that were normally invited to attend meetings of the Commission and its working groups as observers, and to prepare an analytical compilation of those comments.

192. At the close of its deliberations on the draft convention, the Commission adopted the following recommendation to the General Assembly:

"*The United Nations Commission on International Trade Law*,

"*Noting* that it is expected to adopt the draft Convention on Assignment of Receivables in International Trade at its thirty-fourth session, in 2001,

"Bearing in mind that, at that session, it will have to submit a recommendation to the General Assembly as to the procedure for the conclusion of the draft Convention,

"*Recognizing* the importance of concluding the work on the draft Convention in a timely manner,

"1. *Recommends* that the General Assembly include an item entitled 'Conclusion of the draft Convention on Assignment of Receivables in International Trade' in the agenda of its fifty-sixth session, in 2001, with a view to concluding the draft Convention itself or referring it to a conference of plenipotentiaries to be convened in 2002;

"2. *Also recommends* that, if the Commission decides to recommend the holding of a Conference, the General Assembly request the Secretary-General to distribute the draft Convention, as early as possible after its finalization by the Commission at its thirty-fourth session, in 2001, for comments by States and international organizations, including non-governmental organizations normally invited to attend meetings of the Commission as observers."

IV. Privately financed infrastructure projects

A. General remarks

193. At the outset of its consideration of the draft chapters of a legislative guide on privately financed infrastructure projects, the Commission noted that earlier drafts of all chapters of the legislative guide had been considered by the Commission at its thirty-second session, in 1999 (A/CN.9/458/Add.1-9). Some of the chapters had also been considered at the Commission's thirtieth session, in 1997 (A/CN.9/438/Add.1-3), and at its thirty-first session, in 1998 (A/CN.9/444/Add.1-5).

194. Given the advanced stage of preparation of the draft chapters and the extensive deliberations that had taken place at the earlier sessions, it was decided that at the current session the Commission should focus its attention on the legislative recommendations (as contained in the consolidated list of legislative recommendations in A/CN.9/471/Add.9). The Commission was invited to turn to the notes on the legislative recommendations only when that would be necessary to establish whether the notes accurately reflected the deliberations in the Commission at its thirty-second session (and reflected in the relevant part of its report on the session)[3] or when a modification to the notes would be necessary as a result of decisions regarding the draft legislative recommendations. (For the subsequent discussions regarding the finalization of the guide and possible future work in the area of privately financed infrastructure projects, see paras. 375-379 below.)

B. Consideration of draft legislative recommendations

Suggestion for addition of a general legislative recommendation

195. A suggestion was made to introduce, at the beginning of the list of legislative recommendations or at another appropriate place, a note of caution to legislators not to restrict overly the freedom of the parties to shape the project agreement since that would make it more difficult to negotiate or implement privately financed infrastructure projects. While it was agreed that the suggestion was based on valid reasoning, the general opinion was that such a note of caution or recommendation should not be added. One reason given was that the legislative recommendations in their totality had to reflect the appropriate balance between freedom of the parties and restrictions needed to protect the public interest. Another reason was that such general advice was by nature not precise and therefore of limited utility, and might even cause difficulty or confusion if it were to be used in interpreting legislative recommendations in the guide.

196. The Commission adopted the *chapeau* to the legislative recommendations, which appeared before recommendation 1, and read as follows:

> "For host countries wishing to promote privately financed infrastructure projects it is recommended that the following principles be implemented by the law:"

Chapter I. General legislative and institutional framework

Constitutional and legislative framework

197. The Commission postponed its decision on a suggestion to incorporate chapter VII, "Other relevant areas of law", into chapter I, "General legislative and institutional framework" (see para. 369).

Recommendation 1

198. The text of the draft recommendation was as follows:

> "The legislative and institutional framework for the implementation of privately financed infrastructure projects should ensure transparency, fairness and the long-term sustainability of projects. Undesirable restrictions on private sector participation in infrastructure development and operation should be eliminated."

199. In order to reflect the breadth of the recommendation and to align the title with the content of the recommendation, it was decided to expand the title to read "Constitutional, legislative and institutional framework" and the opening words of the recommendation to read "The constitutional, legislative and institutional framework". Subject to those changes, the Commission adopted recommendation 1.

Scope of authority to award concessions

Recommendation 2

200. The text of the draft recommendation was as follows:

> "The law should identify the public authorities of the host country (including, as appropriate, national, provincial and local authorities) that are empowered to enter into agreements for the implementation of privately financed infrastructure projects."

201. The Commission adopted recommendation 2 to the insertion of the words "to award the concession and" between the words "that are empowered" and the words "to enter into agreements".

Recommendation 3

202. The text of the draft recommendation was as follows:

> "Privately financed infrastructure projects may include concessions for the construction and operation of new infrastructure facilities and systems or the maintenance, modernization, expansion and operation of existing infrastructure facilities and systems."

203. Proposals were made to expand the recommendation by adding references to "ownership" of the infrastructure facility and "financing". The proposals did not receive sufficient support on the ground that adding those details might require the addition of other details. Furthermore, whether and to what extent a concession involved ownership of the infrastructure concerned was a matter related to the various policy options available to the host country, which were discussed in the notes. The Commission adopted recommendation 3.

Recommendation 4

204. The text of the draft recommendation was as follows:

"The law should identify the sectors or types of infrastructure in respect of which concessions may be granted."

205. The opinion was expressed that the recommendation envisioned an exhaustive list of sectors or types of infrastructure where concessions might be granted. In that light, a proposal was made to reformulate the recommendation to express the idea that the legislator should set out only a priority list of such sectors or types of infrastructure. In support of the proposal, it was stated that governmental priorities as to the sectors in which concessions might be granted might change over time and that, by having an exhaustive list of sectors in the law, the Government would unnecessarily limit itself in fostering the development of infrastructure.

206. The Commission did not adopt the proposal and noted that it was indicated in paragraph 18 of the accompanying notes that there was more than one possible way of indicating sectors or types of infrastructure in respect of which concessions might be granted. The Commission adopted recommendation 4.

Recommendation 5

207. The text of the draft recommendation was as follows:

"The law should specify the extent to which a concession might extend to the entire region under the jurisdiction of the respective contracting authority, to a geographical subdivision thereof or to a discrete project, and whether it might be awarded with or without exclusivity, as appropriate, in accordance with rules and principles of law, statutory provisions, regulations and policies applying to the sector concerned. Contracting authorities might be jointly empowered to award concessions beyond a single jurisdiction."

208. The Commission adopted recommendation 5.

Recommendation 6

209. The text of the draft recommendation was as follows:

"Institutional mechanisms should be established to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned."

210. The Commission adopted recommendation 6.

Recommendation 7

211. The text of the draft recommendation was as follows:

"The authority to regulate infrastructure services should not be entrusted to entities that directly or indirectly provide infrastructure services."

212. The Commission adopted recommendation 7.

Recommendation 8

213. The text of the draft recommendation was as follows:

"Regulatory competence should be entrusted to functionally independent bodies with a level of autonomy sufficient to ensure that their decisions are taken without political interference or inappropriate pressures from infrastructure operators and public service providers."

214. The Commission adopted recommendation 8.

Recommendation 9

215. The text of the draft recommendation was as follows:

"The rules governing regulatory procedures should be made public. Regulatory decisions should state the reasons on which they are based and should be accessible to interested parties through publication or other means."

216. The Commission adopted recommendation 9.

Recommendation 10

217. The text of the draft recommendation was as follows:

"The law should establish transparent procedures whereby the concessionaire may request a review of regulatory decisions by an independent and impartial body and should set forth the grounds on which a request for review may be based and the availability of court review."

218. The Commission adopted recommendation 10 subject to editorial review of its wording.

Recommendation 11

219. The text of the draft recommendation was as follows:

"Where appropriate, special procedures should be established for handling disputes among public service providers concerning alleged violations of laws and regulations governing the relevant sector."

220. The Commission adopted recommendation 11.

Chapter II. Project risks and government support

Recommendation 12

221. The text of the draft recommendation was as follows:

"No unnecessary statutory or regulatory limitations should be placed upon the contracting authority's ability to agree on an allocation of risks that is suited to the needs of the project."

222. The Commission adopted recommendation 12.

Recommendation 13

223. The text of the draft recommendation was as follows:

> "The law should clearly state which public authorities of the host country may provide financial or economic support to the implementation of privately financed infrastructure projects and which types of support they are authorized to provide."

224. The suggestion was made to add after the words "types of support" the words "including public loans and guarantees, equity participation, subsidies and sovereign guarantees and assurances" to reflect better and more completely the legislative advice that was discussed in the notes. Furthermore, it was stated that it should be made clearer that various authorities in a State might grant public support to a given privately financed infrastructure project. The Commission adopted recommendation 13 without the suggested additions since it was generally felt that both points were sufficiently covered in the notes (A/CN.9/471/Add.3, paras. 30-60).

Chapter III. Selection of the concessionaire

General considerations

Recommendation 14

225. The text of the draft recommendation was as follows:

> "The law should provide for the selection of the concessionaire through transparent and efficient competitive procedures adapted to the particular needs of privately financed infrastructure projects."

226. By way of a general comment, it was pointed out that chapter III contained an extensive set of legislative recommendations and detailed notes thereon. In that connection, the question was raised as to whether it was recommended that the host country should adopt specific legislation dealing with the procedures for selecting the concessionaire.

227. In response, it was noted that the purpose of the legislative recommendations was to assist the host country in developing rules specially suited for the selection of the concessionaire. The recommendations were concerned with the particular needs of privately financed infrastructure projects and differed in many respects from general rules on government procurement, such as those contained in the UNCITRAL Model Law on Procurement of Goods, Construction and Services. However, the recommendations were not intended to replace or reproduce such general rules on government procurement and it was for each host country to decide in which manner they could best be implemented. For example, a State might wish to enact special regulations dealing only with the selection of the concessionaire or might incorporate some of them into general legislation on privately financed infrastructure projects, with cross-references, as appropriate, to other legislation dealing with matters not covered in the recommendations (such as administrative and practical arrangements for conducting the selection proceedings).

228. Besides terminological suggestions accepted by the Commission to ensure consistency among the language versions (i.e. using the term "*procédure de mise en*

compétition" instead of "*procédure ouverte*" in the French text), no further comments were made and the Commission adopted recommendation 14.

Pre-selection of bidders

Recommendation 15

229. The text of the draft recommendation was as follows:

"The bidders should demonstrate that they meet the pre-selection criteria the contracting authority considers appropriate for the particular project, including:

"(a) Adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the project, namely, engineering, construction, operation and maintenance;

"(b) Sufficient ability to manage the financial aspects of the project and capability to sustain the financing requirements for the engineering, construction and operational phases of the project;

"(c) Appropriate managerial and organizational capability, reliability and experience, including previous experience in operating public infrastructure."

230. The Commission adopted recommendation 15.

Recommendation 16

231. The text of the draft recommendation was as follows:

"The bidders should be allowed to form consortia to submit proposals, provided that each member of a pre-selected consortium may participate, either directly or through subsidiary companies, in only one bidding consortium."

232. It was suggested that recommendation 16 should state that the bidders should be authorized to form consortia both for the purpose of submitting proposals and for execution of the project. However, noting that the provision dealt only with issues related to the selection process, the Commission adopted recommendation 16 without the proposed amendment.

Recommendation 17

233. The text of the draft recommendation was as follows:

"The contracting authority should draw up a shortlist of the pre-selected bidders which will subsequently be invited to submit proposals upon completion of the pre-selection phase."

234. The Commission adopted recommendation 17.

Procedure for requesting proposals

Recommendation 18

235. The text of the draft recommendation was as follows:

"Upon completion of the pre-selection proceedings, the contracting authority should invite the pre-selected bidders to submit final propo .als."

236. Subject to substituting the word "request" for the word "invite", the Commission adopted recommendation 18.

Recommendation 19

237. The text of the draft recommendation was as follows:

"Notwithstanding the above, the contracting authority may use a two-stage procedure to request proposals from pre-selected bidders when it is not feasible for the contracting authority to formulate project specifications or performance indicators and contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated. Where a two-stage procedure is used, the following provisions apply:

"(a) The contracting authority should first call upon the pre-selected bidders to submit proposals relating to output specifications and other characteristics of the project as well as to the proposed contractual terms;

"(b) The contracting authority may convene a meeting of bidders to clarify questions concerning the initial request for proposals;

"(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial project specifications and contractual terms prior to issuing a final request for proposals."

238. The suggestion was made that the recommendation should refer to the contracting authority's obligation to keep minutes of meetings with bidders. The Commission felt, however, that the matter would best be left to the notes on the legislative recommendation and adopted recommendation 19 unchanged.

Recommendation 20

239. The text of the draft recommendation was as follows:

"The final request for proposals should include at least the following:

"(a) General information as may be required by the bidders in order to prepare and submit their proposals;

"(b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;

"(c) The contractual terms proposed by the contracting authority;

"(d) The criteria for evaluating the proposals, the relative weight to be accorded to each such criterion and the manner in which criteria are to be applied in the evaluation of proposals."

240. The Commission adopted recommendation 20.

Recommendation 21

241. The text of the draft recommendation was as follows:

"The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, modify the final request for proposals by issuing addenda at a reasonable time prior to the deadline for submission of proposals."

242. The Commission adopted recommendation 21.

Recommendation 22

243. The text of the draft recommendation was as follows:

"The criteria for the evaluation and comparison of the technical proposals should concern the effectiveness of the proposal submitted by the bidder in meeting the needs of the contracting authority, including the following:

"(a) Technical soundness;

"(b) Operational feasibility;

"(c) Quality of services and measures to ensure their continuity;

"(d) Social and economic development potential offered by the proposals."

244. After having considered various proposals made in connection with recommendation 23 (see paras. 248-250), the Commission adopted recommendation 22.

Recommendation 23

245. The text of the draft recommendation was as follows:

"The criteria for the evaluation and comparison of the financial and commercial proposals may include, as appropriate:

"(a) The present value of the proposed tolls, fees and other charges over the concession period;

"(b) The present value of the proposed direct payments by the contracting authority, if any;

"(c) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;

"(d) The extent of financial support, if any, expected from the Government;

"(e) Soundness of the proposed financial arrangements;

"(f) The extent of acceptance of the proposed contractual terms."

246. The Commission agreed to insert the words ", unit prices" before the words "and other charges" in subparagraph (a).

247. In response to a query as to the difference between subparagraphs (b) and (d), it was explained that subparagraph (b) was concerned with direct payments expected from the contracting authority for goods or services actually provided or made available by the concessionaire. Subparagraph (d), in turn, was concerned with financial support, such as loans, subsidies or guarantees provided by the Government, and not necessarily the contracting authority.

248. The Commission considered proposals for rearranging items listed in the recommendations. It was pointed out that assessing the soundness of the proposed financial arrangements was the very purpose of the evaluation of the financial proposals, rather than an evaluation criterion, and that therefore the substance of subparagraph (e) should be incorporated into the *chapeau* of the recommendation. It was further suggested that a distinction should be made between criteria used to evaluate the soundness of the financing proposed for each phase of the project (i.e. construction and operation). Lastly, it was proposed that subparagraph (f) should be deleted because it would not be appropriate to evaluate proposals in terms of their responsiveness to the contractual terms proposed by the contracting authority. It would be preferable to incorporate the notion of responsiveness in the *chapeau* of recommendation 23, and possibly in the *chapeau* of recommendation 22 as well, by inserting words such as "[I]n conformity with the proposed contractual terms".

249. The Commission heard expressions of strong support for those proposals, in particular to the deletion of subparagraph (f), since in some legal systems the acceptance of the contractual terms circulated with the request for proposals was a mandatory requirement. The prevailing view, however, was that the current text of the recommendation should be retained. It was sufficiently clear that the items listed in subparagraphs (a)-(e) were intended to apply, as appropriate, in the evaluation of the soundness of financial proposals in respect of the various phases of the project. As regards subparagraph (f), it was generally felt that the provision was useful and should not be deleted. The complexity of privately financed infrastructure projects made it unlikely that the contracting authority and the selected bidder could agree on the terms of a draft project agreement without negotiations and adjustments to adapt those terms to the particular needs of the project. It was therefore appropriate to include an assessment of the responsiveness of bidders to the proposed contractual terms among the criteria for the evaluation of the financial and commercial proposals.

250. After deliberation, the Commission adopted recommendation 23.

Recommendation 24

251. The text of the draft recommendation was as follows:

> "The contracting authority may establish thresholds with respect to quality, technical and commercial aspects to be reflected in the proposals in accordance with the criteria set out in the request for proposals. Proposals that fail to achieve the thresholds should be regarded as non-responsive."

252. Subject to inserting the word ", financial" before the words "and commercial" in the first sentence, the Commission adopted recommendation 24.

Recommendation 25

253. The text of the draft recommendation was as follows:

> "Whether or not it has followed a pre-selection process, the contracting authority may retain the right to require the bidders to demonstrate their qualifications again in accordance with criteria and procedures set forth in the request for proposals or the pre-selection documents, as appropriate. Where a pre-selection process has been followed, the criteria shall be the same as those used in the pre-selection process."

254. The Commission adopted recommendation 25.

Recommendation 26

255. The text of the draft recommendation was as follows:

> "The contracting authority should rank all responsive proposals on the basis of the evaluation criteria set forth in the request for proposals and invite for final negotiation of the project agreement the bidder that has attained the best rating. Final negotiations may not concern those terms of the contract which were stated as non-negotiable in the final request for proposals."

256. The question was raised as to how the contracting authority should proceed if, after evaluation of the proposals, two or more proposals obtained the highest rating or if there was only an insignificant difference in the rating of two or more proposals. In response, it was stated that under such circumstances it would be appropriate for the contracting authority to invite for negotiations all the bidders that had obtained essentially the same rating. It was generally felt, however, that an appropriate comment to that effect should be included in the relevant notes, rather than in the recommendation.

257. The suggestion was made that the recommendation should include advice as to how contracting authorities should handle requests by prospective lenders for changes in the proposed contractual arrangements. In response, it was stated that the issue, although of great concern in practice, was not necessarily a matter for legislative action and had already been adequately dealt with in paragraphs 56, 70 and 82 of the notes to chapter III (A/CN.9/471/Add.4).

258. After deliberation, the Commission adopted recommendation 26.

Recommendation 27

259. The text of the draft recommendation was as follows:

> "If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a project agreement, the contracting authority should inform that bidder that it is terminating the negotiations and then invite for negotiations the other bidders on the basis of their ranking until it arrives at a project agreement or rejects all remaining proposals."

260. The Commission adopted recommendation 27.

Direct negotiations

Recommendation 28

261. The text of the draft recommendation was as follows:

"The law should set forth the exceptional circumstances under which the contracting authority may be authorized by a higher authority to select the concessionaire through direct negotiations, such as:

"(a) When there is an urgent need for ensuring continuity in the provision of the service and engaging in a competitive selection procedure would therefore be impractical;

"(b) In case of projects of short duration and with an anticipated initial investment value not exceeding a specified low amount;

"(c) Reasons of national defence or national security;

"(d) Cases where there is only one source capable of providing the required service (for example, because it requires the use of patented technology or unique know-how);

"(e) When an invitation to the pre-selection proceedings or a request for proposals has been issued but no applications or proposals were submitted or all proposals failed to meet the evaluation criteria set forth in the request for proposals and if, in the judgement of the contracting authority, issuing a new request for proposals would be unlikely to result in a project award;

"(f) Other cases where the higher authority authorizes such an exception for compelling reasons of public interest."

262. By way of a general comment, it was stated that the expression "direct negotiations", which appeared in recommendations 28 and 29, as well as in the corresponding notes, although adopted by the Commission at its thirty-second session,[4] did not adequately reflect the nature of the procedures described in those recommendations. It was pointed out that recommendations 28 and 29 contemplated the use, under exceptional circumstances, of a procedure different from those described in recommendations 14-27. That difference consisted essentially of the absence of a structured competition among bidders, as was otherwise called for under recommendations 14-27. Negotiations with bidders, however, were not exclusive to recommendations 28 and 29, since a certain degree of negotiation was already provided at various stages of the selection procedure under recommendations 14-27, in particular under recommendations 26 and 27.

263. After deliberation, the Commission decided that the phrase "concession award without competitive procedures" should be used instead of the words "direct negotiations" in the title of section D of chapter III (see A/CN.9/471/Add.4) and that the *chapeau* of recommendation 28 should be amended to read:

"The law should set forth the exceptional circumstances under which the contracting authority may be authorized to award a concession without using competitive procedures, such as:"

264. The Commission noted that, as a result of the adoption of the new wording, a series of consequential amendments might be required in the relevant notes in

chapter III (see A/CN.9/471/Add.4) and possibly in other legislative recommendations and parts of the draft legislative guide. The Commission requested the Secretariat to ensure that the necessary changes were made.

265. The Commission agreed that recommendation 28 should also refer to unsolicited proposals, which under certain circumstances might justify the award of a concession without competitive procedures (see paras. 277 and 279).

Recommendation 29

266. The text of the draft recommendation was as follows:

"The law may require that the following procedures be observed in direct negotiations:

"(a) The contracting authority should publish a notice of the negotiation proceedings and engage in negotiations with as many companies judged capable of carrying out the project as circumstances permit;

"(b) The contracting authority should establish and make known to bidders the qualification criteria and the criteria for evaluating the proposals and should determine the relative weight to be accorded to each such criterion and the manner in which criteria are to be applied in the evaluation of the proposals;

"(c) The contracting authority should treat proposals in a manner that avoids the disclosure of their contents to competing bidders;

"(d) Any such negotiations between the contracting authority and bidders should be confidential and one party to the negotiations should not reveal to any other person any technical, price or other commercial information relating to the negotiations without the consent of the other party;

"(e) Following completion of negotiations, the contracting authority should request all bidders remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals;

"(f) Proposals should be evaluated and ranked according to the criteria for the evaluation of proposals established by the contracting authority."

267. The view was expressed that recommendation 29 was unnecessarily detailed on procedural matters of limited practical relevance, since a contracting authority faced with the exceptional circumstances referred to in recommendation 28 might often have no choice but to negotiate with only one company. For the conceivably rare cases where the contracting authority had more choices, it would be sufficient if the notes referred to measures to introduce competitiveness into such negotiations, such as those referred to in subparagraphs (b), (c) and (e), which, however, in their current form, were not needed. More important than those provisions was the disclosure of the reasons for awarding a concession without competitive procedures, a requirement that should be expressly made in recommendation 29. As for subparagraph (d), which was said to be relevant for the final negotiations under recommendations 26 and 27 as well, it was proposed that it should become a separate recommendation and be placed before recommendation 36.

268. Strong support was expressed for those proposals, which were generally felt to enhance transparency in the award of concessions without the use of competitive procedures. It was pointed out, however, that the requirement of publicity concerning the reasons for awarding a concession without competitive procedures should be weighted against other reasons of public interest, in particular the need for confidentiality of decisions on matters of national defence or security.

269. After deliberation, the Commission agreed that recommendation 29 should be redrafted along the following lines:

"The law may require that the following procedures be observed for the award of a concession without competitive procedures:

"(a) The contracting authority should publish a notice of its intention to award a concession for the implementation of the proposed project and should engage in negotiations with as many companies judged capable of carrying out the project as circumstances permit;

"(b) Offers should be evaluated and ranked according to the criteria for the evaluation of proposals established by the contracting authority;

"(c) Except for the situation referred to in recommendation 28 (c), the contracting authority should cause a public notice of the concession award to be published, disclosing the specific circumstances and reasons for the award of the concession without competitive procedures."

270. The Commission noted that, as a result of the adoption of the new text for recommendation 29, a series of consequential amendments might be required in the relevant notes in chapter III (A/CN.9/471/Add.4) and possibly in other legislative recommendations and parts of the draft legislative guide. The Commission requested the Secretariat to ensure that the necessary changes were made.

Unsolicited proposals

Recommendation 30

271. The text of the draft recommendation was as follows:

"By way of exception to the selection procedures described in legislative recommendations 14-27, the contracting authority may be authorized to handle unsolicited proposals pursuant to specific procedures established by the law for handling unsolicited proposals, provided that such proposals do not relate to a project for which selection procedures have been initiated or announced by the contracting authority."

272. The Commission adopted recommendation 30.

Recommendation 31

273. The text of the draft recommendation was as follows:

"Following receipt and preliminary examination of an unsolicited proposal, the contracting authority should inform the proponent, within a reasonably short period, whether or not there is a potential public interest in the project. If the project is found to be in the public interest, the contracting authority should invite the proponent to submit a formal proposal in sufficient detail to allow the contracting authority to make a proper evaluation of the

concept or technology and determine whether the proposal meets the conditions set forth in the law and is likely to be successfully implemented on the scale of the proposed project."

274. The Commission adopted recommendation 31.

Recommendation 32

275. The text of the draft recommendation was as follows:

"The proponent should retain title to all documents submitted throughout the procedure and those documents should be returned to it in the event the proposal is rejected."

276. The Commission adopted recommendation 32.

Recommendation 33

277. The text of the draft recommendation was as follows:

"The contracting authority should initiate competitive selection procedures under recommendations 14-27 above if it is found that the envisaged output of the project can be achieved without the use of a process, design, methodology or engineering concept for which the author of the unsolicited proposal possesses exclusive rights or if the proposed concept or technology is not truly unique or new. The author of the unsolicited proposal should be invited to participate in such proceedings and might be given a premium for submitting the proposal."

278. The Commission adopted recommendation 33.

Recommendation 34

279. The text of the draft recommendation was as follows:

"If it appears that the envisaged output of the project cannot be achieved without using a process, design, methodology or engineering concept for which the author of the unsolicited proposal possesses exclusive rights, the contracting authority should seek to obtain elements of comparison for the unsolicited proposal. For that purpose, the contracting authority should publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit alternative or comparable proposals within a certain reasonable period."

280. The Commission adopted recommendation 34.

Recommendation 35

281. The text of the draft recommendation was as follows:

"The contracting authority may engage in negotiations with the author of the unsolicited proposal if no alternative proposals are received, subject to approval by a higher authority. If alternative proposals are submitted, the contracting authority should invite all the proponents to negotiations in accordance with the provisions of legislative recommendation 29 (b)-(f)."

282. The Commission adopted recommendation 35 (but see paras. 269 and 270).

Review procedures

Recommendation 36

283. The text of the draft recommendation was as follows:

> "Bidders who claim to have suffered, or who may suffer, loss or injury owing to a breach of a duty imposed on the contracting authority by the law may seek review of the contracting authority's acts in accordance with the laws of the host country."

284. The Commission agreed that recommendation 36 should be the final recommendation on the selection of the concessionaire and that its accompanying notes should be moved to the end of chapter III (A/CN.9/471/Add.4). Subject to those changes, the Commission adopted recommendation 36.

Notice of project award

Recommendation 37

285. The text of the draft recommendation was as follows:

> "The contracting authority should cause a notice of the award of the project to be published. The notice should identify the concessionaire and include a summary of the essential terms of the project agreement."

286. The Commission adopted recommendation 37.

Record of selection and award proceedings

Recommendation 38

287. The text of the draft recommendation was as follows:

> "The contracting authority should keep an appropriate record of key information pertaining to the selection and award proceedings. The law should set forth the requirements for public access."

288. Subject to restoring the second sentence of the recommendation in the French version, where it did not appear, the Commission adopted recommendation 38.

Chapter IV. Construction and operation of infrastructure

289. The Commission requested the Secretariat to revise the title of the chapter so as to reflect more clearly the issues discussed therein, which were largely concerned with the contents of the project agreement and its relation to the construction and operation of infrastructure. Subsequently the Secretariat proposed the following title, which was approved by the Commission: "Construction and operation: legislative framework and project agreement"

General provisions on the project agreement

Recommendation 39

290. The text of the draft recommendation was as follows:

"The law might identify the core terms to be provided in the project agreement, which may include those terms referred to in recommendations 39-65 below."

291. Subject to changing the cross-reference to legislative recommendations 40-67, the Commission adopted recommendation 39.

Recommendation 40

292. The text of the draft recommendation was as follows:

"Unless otherwise provided, the project agreement is governed by the law of the host country."

293. In response to a question as to the meaning of the opening phrase of the recommendation, it was pointed out that the issue of the law governing the project agreement had been the subject of extensive debate at the thirty-second session of the Commission. The flexible wording eventually agreed upon by the Commission was intended to take into account the fact that, under some legal systems, provisions allowing for the application of a law other than the law of the host country could only be of a statutory nature, whereas in other legal systems the contracting authority might have the power to agree on the applicable law. The Commission adopted recommendation 40.

Organization of the concessionaire

Recommendation 41

294. The text of the draft recommendation was as follows:

"The contracting authority should have the option to require that the selected bidders establish an independent legal entity with a seat in the country."

295. The Commission adopted recommendation 41.

Recommendation 42

296. The text of the draft recommendation was as follows:

"The project agreement should specify the minimum capital of the project company and the procedures for obtaining the approval of the contracting authority to its statutes and by-laws of the project company and fundamental changes therein."

297. The Commission adopted recommendation 42.

The project site and easements

Recommendation 43

298. The text of the draft recommendation was as follows:

> "The project agreement should specify, as appropriate, which assets will be public property and which assets will be the private property of the concessionaire. The project agreement should identify which assets the concessionaire is required to transfer to the contracting authority or to a new concessionaire upon expiry or termination of the project agreement; which assets the contracting authority, at its option, may purchase from the concessionaire; and which assets the concessionaire may freely remove or dispose of upon expiry or termination of the project agreement."

299. The Commission adopted recommendation 43, subject to amending the heading to read "project site, assets and easements".

Recommendation 44

300. The text of the draft recommendation was as follows:

> "The contracting authority should assist the concessionaire in the acquisition of easements needed for the operation, construction and maintenance of the facility. The law might empower the concessionaire to enter upon, transit through, do work or fix installations upon property of third parties, as required for the construction and operation of the facility."

301. The view was expressed that the reference in the first sentence of the recommendation to assistance by the contracting authority in connection with the acquisition of easements was unclear and possibly in conflict with the second sentence of the recommendation. It was proposed that the first sentence of the recommendation be expanded to reflect the idea that the contracting authority should assist in securing the land and other property required by the concessionaire to carry out the project. The Commission heard expressions of strong support for that proposal. It was pointed out that, in practice, considerable problems in the implementation of infrastructure projects might be caused by delay in acquiring the land for the project site. That problem, it was pointed out, had been identified in paragraphs 20-22 of chapter IV, "Construction and operation of infrastructure" (see A/CN.9/471/Add.5), but no legislative recommendation reflected the discussion in those notes. The legislative guide, it was stated, had an important role to play in reminding contracting authorities, by a legislative recommendation, of their responsibility for providing the concessionaire with the assistance required to secure an appropriate site for the project.

302. The countervailing view, which also met with strong support, was that issues related to acquisition and ownership of land were foreign to recommendation 44, which was only concerned with easements that might be needed by the concessionaire in connection with the construction, operation or maintenance of the infrastructure facility. The perceived lack of clarity of the sentence was attributable to the use of the phrase "acquisition of easements", which was said to create difficulties of interpretation in some legal systems. If the Commission felt that the first sentence of the recommendation was unclear, it would be preferable to delete the sentence rather than to expand it as had been proposed.

303. The Commission considered various proposals made to address the concerns that had been expressed. It was pointed out that, in paragraphs 30-32 of chapter IV, "Construction and operation of infrastructure" (see A/CN.9/471/Add.5), two alternative ways were identified for the concessionaire to obtain the easements it required: either by appropriate arrangements between the concessionaire and the owners of the property concerned or by legislation that empowered the concessionaire to enter, pass through or do work or fix installations upon the property of third parties. It was thus proposed that the connection between the two sentences of the recommendation be clarified by adding words such as "[A]nother solution might be for the law to empower" at the beginning of the second sentence. In response, it was stated that the proposal might indeed be useful to clarify the way in which the legislative recommendation reflected the discussion of legal problems related to easements in the notes. However, by dealing only with easements, the proposal did not provide an adequate answer to questions related to the project site itself, which had been identified in the notes to the legislative recommendations.

304. After consideration of the different views and proposals heard by the Commission, the prevailing view was that the first sentence of the legislative recommendation should be redrafted to read: "The contracting authority should assist the concessionaire in obtaining such rights related to the project site as necessary for the operation, construction and maintenance of the facility." Subject to that amendment and to the addition of the word "maintenance" in the second sentence, the Commission adopted recommendation 44. The Commission requested the Secretariat to make the necessary adjustments to the notes in order to align them with the new text of the recommendation. It was generally understood that the recommendation did not affect the property regime in the host country.

Financial arrangements

Recommendation 45

305. The text of the draft recommendation was as follows:

> "The law should enable the concessionaire to collect tariffs or user fees for the use of the facility or the services it provides. The project agreement should provide for methods and formulas for the adjustment of those tariffs or user fees."

306. The Commission adopted recommendation 45.

Recommendation 46

307. The text of the draft recommendation was as follows:

> "Where the tariffs or fees charged by the concessionaire are subject to external control by a regulatory body, the law should set forth the mechanisms for periodic and extraordinary revisions of the tariff adjustment formulas."

308. The Commission adopted recommendation 46.

Recommendation 47

309. The text of the draft recommendation was as follows:

> "The contracting authority should have the power, where appropriate, to agree to make direct payments to the concessionaire as a substitute for, or in

addition to, service charges to be paid by the users or to enter into commitments for the purchase of fixed quantities of goods or services."

310. The Commission adopted recommendation 47.

Security interests

Recommendation 48

311. The text of the draft recommendation was as follows:

"The concessionaire should be responsible for raising the funds required to construct and operate the infrastructure facility and, for that purpose, should have the right to secure any financing required for the project with a security interest in any of its property, with a pledge of shares of the project company, with a pledge of the proceeds and receivables arising out of the concession or with other suitable security, without prejudice to any rule of law that might prohibit the creation of security interests in public property in the possession of the concessionaire."

312. Subject to the deletion of the words "in the possession of the concessionaire", the Commission adopted recommendation 48.

Assignment of the concession

Recommendation 49

313. The text of the draft recommendation was as follows:

"The project agreement should set forth the conditions under which the contracting authority might give its consent to an assignment of the concession, including the acceptance by the new concessionaire of all obligations under the project agreement and evidence of the new concessionaire's technical and financial capability as necessary for providing the service. The concession should not be assigned to third parties without the consent of the contracting authority."

314. The view was expressed that the second sentence of the recommendation was overly restrictive and might hinder the contracting authority's ability to enter into a direct agreement with lenders for the substitution of the concessionaire by another entity selected in agreement with the lenders in case of default by the concessionaire. In response, it was pointed out that infrastructure concessions, as generally understood by the Commission, were awarded in the light of the concessionaire's technical and financial capabilities and, as such, were not freely transferable, a principle that was reflected in the second sentence. The possibility given to lenders to appoint a substitute concessionaire in agreement with the contracting authority (a situation covered by the first sentence of the recommendation), constituted an exception accepted by the Commission to the general rule stated in the second sentence.

315. Subject to reversing the order of the two sentences, in order to clarify the way they related to one another, the Commission adopted recommendation 49.

Transfer of controlling interest in the project company

Recommendation 50

316. The text of the draft recommendation was as follows:

"The transfer of a controlling interest in the capital of a concessionaire company may require the consent of the contracting authority."

317. The view was expressed that the recommendation was overly restrictive, since there were circumstances where restrictions on the transfer of a controlling interest in a concessionaire company might not be reasonable. In response, it was noted that recommendation 50 shared the same rationale as recommendation 49. Nevertheless, with a view to making it clear that there might be exceptions to such a rule, it was agreed that words such as "unless otherwise provided" should be added at the end of the recommendation.

318. Subject to that amendment and the deletion of the words "the capital of", which were deemed unnecessary, the Commission adopted recommendation 50.

Construction works

Recommendation 51

319. The text of the draft recommendation was as follows:

"The project agreement should set forth the procedures for the review and approval of construction plans and specifications by the contracting authority, the contracting authority's right to monitor the construction of, or improvements to, the infrastructure facility, the conditions under which the contracting authority may order variations in respect of construction specifications and the procedures for testing and final inspection, approval and acceptance of the facility, its equipment and appurtenances."

320. The Commission adopted recommendation 51.

Operation of infrastructure

Recommendation 52

321. The text of the draft recommendation was as follows:

"The project agreement should set forth, as appropriate, the extent of the concessionaire's obligations to ensure:

"(a) The adaptation of the service so as to meet the actual demand for the service;

"(b) The continuity of the service;

"(c) The availability of the service under essentially the same conditions to all users;

"(d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire."

322. It was suggested that the words "evolution of demand" should be substituted for the words "actual demand" in subparagraph (a), so as to express more clearly the idea that the concessionaire was under an obligation to ensure the adaptation of the

service to both quantitative and qualitative changes of demand. It was also suggested that subparagraph (c) should refer to the concessionaire's obligation to "ensure equal access" of users to the service. Lastly, it was suggested that subparagraph (d) should refer to the need to ensure interconnection between infrastructure networks under objective, transparent and non-discriminatory conditions.

323. Noting that the issues discussed in the recommendation had been extensively debated at its previous sessions, the Commission adopted recommendation 52 without the proposed amendments.[5]

Recommendation 53

324. The text of the draft recommendation was as follows:

"The project agreement should set forth:

"(a) The extent of the concessionaire's obligation to provide the contracting authority or a regulatory body, as appropriate, with reports and other information on its operations;

"(b) The procedures for monitoring the concessionaire's performance and for taking such reasonable actions as the contracting authority or a regulatory body may find appropriate, to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements."

325. The Commission adopted recommendation 53.

Recommendation 54

326. The text of the draft recommendation was as follows:

"The concessionaire should have the right to issue and enforce rules governing the use of this facility, subject to the approval of the contracting authority or a regulatory body."

327. The Commission adopted recommendation 54.

General contractual arrangements

Recommendation 55

328. The text of the draft recommendation was as follows:

"The contracting authority may reserve the right to review and approve major contracts to be entered into by the concessionaire, in particular contracts with the concessionaire's own shareholders or related persons. The contracting authority's approval should not normally be withheld except where the contracts contain provisions inconsistent with the project agreement or manifestly contrary to the public interest or to mandatory rules of a public law nature."

329. The Commission adopted recommendation 55.

Recommendation 56

330. The text of the draft recommendation was as follows:

"The concessionaire and its lenders, insurers and other contracting partners should be free to choose the law applicable to govern their contractual relations, except where such a choice would violate the host country's public policy."

331. The Commission adopted recommendation 56.

Recommendation 57

332. The text of the draft recommendation was as follows:

"The project agreement should set forth:

"(a) The forms, duration and amounts of the guarantees of performance that the concessionaire may be required to provide in connection with the construction and the operation of the facility;

"(b) The insurance policies that the concessionaire may be required to maintain;

"(c) The compensation to which the concessionaire may be entitled following the occurrence of legislative changes or other changes in the economic or financial conditions that render the performance of the obligation substantially more onerous than originally foreseen. The project agreement should further provide mechanisms for revising the terms of the project agreement following the occurrence of any such changes;

"(d) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the project agreement owing to circumstances beyond their reasonable control;

"(e) Remedies available to the contracting authority and the concessionaire in the event of default by the other party."

333. The Commission adopted recommendation 57.

Recommendation 58

334. The text of the draft recommendation was as follows:

"The project agreement should set forth the circumstances under which the contracting authority may temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the concessionaire to perform its obligations."

335. The Commission adopted recommendation 58.

Recommendation 59

336. The text of the draft recommendation was as follows:

"The contracting authority should be authorized to enter into agreements with the lenders providing for the appointment, with the consent of the contracting authority, of a new concessionaire to perform under the existing

project agreement if the concessionaire seriously fails to deliver the service required or if other specified events occur that could justify the termination of the project agreement."

337. The Commission adopted recommendation 59.

Chapter V. Duration, extension and termination of the project agreement

Duration and extension of the project agreement

Recommendation 60

338. The text of the draft recommendation was as follows:

"The duration of the concession should be specified in the project agreement."

339. The Commission adopted recommendation 60.

Recommendation 61

340. The text of the draft recommendation was as follows:

"The term of the concession should not be extended, except under those circumstances specified in the law, such as:

"(a) Completion delay or interruption of operation due to the occurrence of circumstances beyond either party's reasonable control;

"(b) Project suspension brought about by acts of the contracting authority or other public authorities;

"(c) To allow the concessionaire to recover additional costs arising from requirements of the contracting authority not originally foreseen in the project agreement that the concessionaire would not be able to recover during the normal term of the project agreement."

341. A suggestion was made to replace in subparagraph (a) the concept of "circumstances beyond either party's reasonable control" by the expression "*force majeure*" (and to use the equivalent expression in the other language versions). This was suggested because the proposed term was widely known and understood in the context of various national laws. The Commission preferred to retain the current text, however, because it used an expression that conveyed the intended meaning but was less likely to be subject to possible different interpretations and meanings in national legal systems than the term "*force majeure*". It was noted that the current wording had been modelled on article 79 of the United Nations Sales Convention, which had also been used as a model in other international texts such as the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (chap. XXI, "Exemption clauses", para. 6). In order not to depart from those models, the Commission also did not accept the suggestion to delete the word "reasonable" from subparagraph (a).

342. The Commission adopted recommendation 61.

Termination of the project agreement

Recommendation 62

343. The text of the draft recommendation was as follows:

"The contracting authority should have the right to terminate the project agreement:

"(a) In the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;

"(b) For reasons of public interest, subject to payment of compensation to the concessionaire."

344. A proposal was made to replace in subparagraph (a) the words "it can no longer be reasonably expected that the concessionaire will be able" with the words "the concessionaire is unable". The proposal was not adopted because the suggested words would have implied that termination would be available only after it was established that the concessionaire was unable to perform its obligations. The policy underlying the sub-paragraph, in turn, was to allow termination already when it was reasonably certain that the concessionaire would be unable to perform its obligations. It was important to maintain the current wording in order to allow the contracting authority to terminate the concession soon enough to be able to find an alternative way of providing the public service.

345. The Commission adopted recommendation 62.

Recommendation 63

346. The text of the draft recommendation was as follows:

"The concessionaire should have the right to terminate the project agreement under exceptional circumstances specified in the law, such as:

"(a) In the event of serious breach by the contracting authority or other public authority as regards the fulfilment of their obligations under the project agreement;

"(b) In the event that the concessionaire's performance is rendered substantially more onerous as a result of variation orders or other acts of the contracting authority, unforeseen changes in conditions or acts of other public authorities and that the parties have failed to agree on an appropriate revision of the project agreement."

347. It was suggested that the recommendation should be reformulated so as to reflect the idea that, at least in some legal systems, the concessionaire's right to terminate the project agreement was based on grounds that were different from and were more restricted than the contracting authority's right to terminate the concession. The Commission did not accept the suggestion because it considered that the extent of the right of the concessionaire to terminate the project agreement (as compared to such a right of the contracting authority) was appropriately explained in the notes on the legislative recommendation (A/CN.9/471/Add.6, para. 28).

348. The Commission adopted recommendation 63.

Recommendation 64

349. The text of the draft recommendation was as follows:

"Either party should have the right to terminate the project agreement in the event that the performance of its obligations is rendered impossible by the occurrence of circumstances beyond either party's reasonable control. The parties should also have the right to terminate the project agreement by mutual consent."

350. The Commission adopted recommendation 64.

Consequences of expiry or termination of the project agreement

Recommendation 65

351. The text of the draft recommendation was as follows:

"The project agreement should lay down the criteria for establishing, as appropriate, the compensation to which the concessionaire may be entitled in respect of assets transferred to the contracting authority or to a new concessionaire or purchased by the contracting authority upon expiry or termination of the project agreement."

352. The Commission adopted recommendation 65.

Recommendation 66

353. The text of the draft recommendation was as follows:

"The project agreement should stipulate how compensation due to either party in the event of termination of the project agreement is to be calculated, providing, where appropriate, for compensation for the fair value of works performed under the project agreement and for losses, including lost profits."

354. The Commission adopted recommendation 66.

Recommendation 67

355. The text of the draft recommendation was as follows:

"The project agreement should set out, as appropriate, the rights and obligations of the parties with respect to:

"(a) The transfer of technology required for the operation of the facility;

"(b) The training of the contracting authority's personnel or of a successor concessionaire in the operation and maintenance of the facility;

"(c) The provision, by the concessionaire, of operation and maintenance services and the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor concessionaire."

356. The Commission adopted recommendation 67.

Chapter VI. Settlement of disputes

Disputes between the contracting authority and the concessionaire

Recommendation 68

357. The text of the draft recommendation was as follows:

> "The contracting authority should be free to agree to dispute settlement mechanisms regarded by the parties as suited to the needs of the project, including arbitration."

358. The suggestion was made to delete the words "including arbitration", as arbitration was one of the methods of settling disputes and it should not be singled out in the recommendation to the exclusion of others. Considerable support was expressed for that suggestion and reasoning. However, there was also wide support for retaining the words in the recommendation, since arbitration, which was crucial for the settlement of international disputes, was the only binding non-judicial method that was typically required by investors in international privately financed infrastructure projects. The recommendation was also deemed necessary in view of the fact that a number of countries were modifying their laws to allow contracting authorities to use arbitration in privately financed infrastructure projects. A further suggestion was to clarify that the freedom to agree to arbitrate included the freedom to agree to arbitration in a country other than the host country.

359. After weighing the various arguments and wishing to present a balanced text reflecting the differing views and also taking into consideration the explanations given in the notes (A/CN.9/471/Add.7, paras. 30-38), the Commission decided to delete the words "including arbitration". However, in order to reflect the importance of arbitration in international privately financed infrastructure projects, it decided to reformulate the third sentence of paragraph 30 of the notes to the effect that "[A]rbitration, often in a country other than the host country, was preferred and in many cases required by private investors and lenders". The Commission also reformulated the expression in the recommendation "regarded by the parties as suited" to read "regarded by the parties as best suited".

360. The Commission decided to add in paragraph 27 of the notes (A/CN.9/471/Add.7) the words "or arbitrate" after the words "to accept the recommendations voluntarily rather than litigate" and to add the words "or arbitration" after the words "[A]part from avoiding potentially protracted litigation".

361. Subject to those modifications, the Commission adopted recommendation 68.

Recommendation 68 bis

362. The text of the draft recommendation was as follows:

> "[The law should indicate whether and, if so, to what extent the contracting authority may raise a plea of sovereign immunity, both as a bar to the commencement of arbitral or judicial proceedings and as a defence against enforcement of the award or judgement.]"

363. Wide support was expressed for the deletion of the recommendation. It was noted that the recommendation raised controversial issues that had not yet been

settled in international law, that the recommendation did not and could not deal with the issue of whether sovereign immunity was a matter requiring general treatment in legislation or was to be left to the discretion of the executive branch of the Government, and that sovereign immunity was currently expected to be considered by the Sixth Committee of the General Assembly and the outcome of that consideration was not yet known. Objections were also raised with regard to the proposal on the ground that the recommendation and the accompanying notes did not call for a unified or harmonized legislative approach to the matter and did not suggest any particular solution to be adopted. The recommendation was merely calling upon States to clarify whether and, if so, to what extent the contracting authority might raise a plea of sovereign immunity. Nevertheless, the prevailing view was that recommendation 68 *bis* should be deleted.

364. The Commission turned its attention to the notes accompanying the recommendation and accepted the suggestion to replace in paragraph 36 the words "may not plead sovereign immunity" with the words "may or may not plead sovereign immunity" and to transpose the amended paragraph 36 to precede paragraph 33. The Commission did not accept a suggestion to delete the last sentence of paragraph 33.

Disputes between the concessionaire and its lenders, contractors and suppliers

Recommendation 69

365. The text of the draft recommendation was as follows:

> "The concessionaire should be free to choose the appropriate mechanisms for settling commercial disputes among the project promoters, or disputes between the concessionaire and its lenders, contractors, suppliers and other business partners."

366. The Commission adopted recommendation 69 subject to the addition of the words "and the project promoters" before the words "should be free".

Disputes between the concessionaire and its customers

Recommendation 70

367. The text of the draft recommendation was as follows:

> "The concessionaire may be required to make available simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility."

368. The Commission adopted recommendation 70. As regards the accompanying notes (A/CN.9/471/Add.7, para. 43, in particular the second and third sentences), it was observed that, while lenders frequently preferred that arbitration be used for solving disputes arising out of the project agreement and increasingly also for disputes between different lenders, judicial proceedings were often the preferred method for disputes arising out of loan agreements between the lenders and the concessionaire. The Commission requested the Secretariat to reformulate the paragraph to reflect that circumstance.

C. Finalization of the legislative guide

369. The Commission heard expressions of strong support for proposals for rearranging the chapters of the legislative guide, in particular a proposal to combine chapter VII, "Other relevant areas of law" (A/CN.9/471/Add.8), with chapter I, "General legislative and institutional framework" (A/CN.9/471/Add.2). Nevertheless, the Commission decided to retain the current structure of the guide.

370. The Commission decided that all legislative recommendations should appear together before the notes thereto, rather than at the beginning of the chapters to which each block of recommendations pertained.

371. The Commission requested the Secretariat to review and revise, as appropriate, the text of the notes to the legislative recommendations in order to ensure consistency with the recommendations, as adopted by the Commission, as well as terminological accuracy and consistency in the various language versions. The Commission invited its members and observers participating at the current session to submit their linguistic observations or suggestions directly to the Secretariat.

D. Adoption of the legislative guide

372. At its 703rd meeting, on 29 June 2000, the Commission adopted the Legislative Guide, consisting of the legislative recommendations (A/CN.9/471/Add.9), with the amendments adopted by the Commission at the current session (see paras. 195-368 above) and the notes to the legislative recommendations (A/CN.9/471/Add.1-8), which the Secretariat was authorized to finalize in the light of the deliberations of the Commission. The Commission mandated the publication of the Guide under the title "UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects" and requested the Secretariat to transmit the text of the Guide to Governments and other interested bodies. The Commission also recommended that all States give favourable consideration to the Legislative Guide when revising or adopting legislation relevant to privately financed infrastructure projects. It furthermore requested the Secretariat to ensure the widest possible dissemination of the Guide.

373. Upon the adoption of the Legislative Guide, the Commission heard a statement by the representative of the Economic Commission for Europe (ECE), who congratulated the Commission on the completion of the Guide, which was expected to become a useful instrument for domestic legislators and policy makers. While domestic policies for infrastructure in the early 1990s had given preference to ad hoc contractual solutions, there was growing awareness of the importance of an adequate legislative and regulatory framework for privately financed infrastructure projects. ECE had developed considerable expertise in various areas related to those projects, in particular economic, financial and contractual aspects, and was preparing guidelines to assist domestic public authorities in negotiating project agreements. ECE stood ready to assist the secretariat of the Commission in disseminating the Legislative Guide and to cooperate in other areas of common interest.

374. The Commission took note with appreciation of the statement of the representative of ECE and expressed its gratitude to ECE for its interest in cooperating with the UNCITRAL secretariat.

E. Possible future work in the area of privately financed infrastructure projects

375. The view was expressed that the Legislative Guide, as it stood, would be a useful reference for domestic legislators in establishing a legal framework favourable to private investment in public infrastructure. Nevertheless, it would be desirable for the Commission to formulate more concrete guidance in the form of model legislative provisions or even in the form of a model law dealing with specific issues. Such a proposal had been made at the early stages of the preparation of the Legislative Guide and had since been reiterated on various occasions. The preference that the Commission had expressed for the preparation of a Legislative Guide had been mainly attributable to a lack of consensus as to which of the various issues dealt with in the Guide might be suitable subjects of model legislative provisions. However, in the course of that work, a clearer understanding had developed within the Commission with regard to the issues involved and the options available. The legislative recommendations adopted by the Commission at the current session reflected that common understanding and represented a good starting point for future work aimed at providing more concrete guidance, for which there was a pressing need, in particular in countries with economies in transition and in developing countries.

376. Strong support was expressed for the above proposals. It was stated that concrete legislative guidance in the form of a model law or model legislative provisions would be especially useful for legislators and policy makers in countries that lacked the expertise or the human resources to analyse in depth the various issues discussed in the Legislative Guide. It was also said that, in its current form, the Guide was rather lengthy and some of the legislative recommendations were not easy to translate into legislative language. As to the appropriate time for starting such future work, views differed as to whether the Commission should take a decision at its current session or should await the completion of other ongoing projects.

377. Strong objections were voiced to the above proposals. As a matter of principle, the proposals were objected to in the light of the potential difficulty and undesirability of formulating model legislative provisions on privately financed infrastructure projects in view of the diversity of national legal traditions and administrative practices. Furthermore, those projects typically raised highly complex legal issues, some of which concerned matters of public policy. The legislative recommendations had been carefully drafted by the Commission to take into account that diversity. They represented the widest possible consensus that could have been achieved on the issues dealt with. The Commission was reminded of its overall workload and of the limited resources available to its secretariat and was urged not to embark upon a potentially time-consuming exercise of doubtful feasibility.

378. Other reservations, while not questioning in principle the desirability or the feasibility of preparing a model law or model legislative provisions, were based on

the need to allow the Legislative Guide to be first tested in practice before future work was undertaken in the same field. Concern was expressed that an immediate decision to prepare a model law or model legislative provisions might be interpreted as a sign of dissatisfaction by the Commission with the work that had just been accomplished. The Commission should give itself sufficient time to follow up on the use made of the Legislative Guide by domestic legislators and policy makers, to whom the Guide was addressed, so as to be in a better position to make a decision on the desirability of preparing a new instrument.

129. After consideration of the various views expressed, it was decided that the question of the desirability and feasibility of preparing a model law or model legislative provisions on selected issues covered by the Legislative Guide should be considered by the Commission at its thirty-fourth session, in 2001. In order to assist the Commission in making an informed decision on the matter, it was agreed that it would be desirable for the Secretariat, in cooperation with other interested international organizations or international financial institutions, to organize a colloquium to disseminate knowledge about the Legislative Guide. The participants in the colloquium, who should include, to the extent possible, experts from the various legal traditional and economic systems represented at the Commission, should be invited to make recommendations on the desirability and, especially, the feasibility of a model law or model legislative provisions in the area of privately financed infrastructure projects for consideration by the Commission at its thirty-fourth session. Alternatively, should such a colloquium not be feasible, the Secretariat was requested to seek the views of outside experts representing, to the widest extent possible, the various legal traditions and economic systems represented at the Commission on the matter and to prepare a report on the conclusions of its consultations with experts for consideration by the Commission at its thirty-fourth session.

V. Electronic commerce

A. Draft uniform rules on electronic signatures

380. It was recalled that the Commission, at its thirtieth session, in 1997, had endorsed the conclusions reached by the Working Group on Electronic Commerce at its thirty-first session with respect to the desirability and feasibility of preparing uniform rules on issues of digital signatures and certification authorities and possibly on related matters (see A/CN.9/437, paras. 156 and 157). The Commission entrusted the Working Group with the preparation of uniform rules on the legal issues of digital signatures and certification authorities.[6] The Working Group began the preparation of uniform rules for electronic signatures at its thirty-second session (January 1998) on the basis of a note prepared by the Secretariat (A/CN.9/WG.IV/WP.73). At its thirty-first session, in 1998, the Commission had before it the report of the Working Group (A/CN.9/446). The Commission noted that the Working Group, throughout its thirty-first and thirty-second sessions, had experienced manifest difficulties in reaching a common understanding of the new legal issues that had arisen from the increased use of digital and other electronic signatures. However, it was generally felt that the progress achieved so far indicated that the draft uniform rules on electronic signatures were progressively being shaped into a workable structure. The Commission reaffirmed the decision it had taken at its thirtieth session as to the feasibility of preparing such uniform rules and noted with satisfaction that the Working Group had become generally recognized as a particularly important international forum for the exchange of views regarding the legal issues of electronic commerce and for the preparation of solutions to those issues.[7]

381. The Working Group continued its work at its thirty-third (July 1998) and thirty-fourth (February 1999) sessions on the basis of notes prepared by the Secretariat (A/CN.9/WG.IV/WP.76, 79 and 80). At its thirty-second session, in 1999, the Commission had before it the reports of the Working Group on the work of those two sessions (A/CN.9/454 and A/CN.9/457, respectively). While the Commission generally agreed that significant progress had been made in the understanding of the legal issues of electronic signatures, it was also felt that the Working Group had been faced with difficulties in building a consensus as to the legislative policy on which the uniform rules should be based. After discussion, the Commission reaffirmed its earlier decisions as to the feasibility of preparing such uniform rules and expressed its confidence that more progress could be accomplished by the Working Group at its forthcoming sessions. While it did not set a specific time-frame for the Working Group to fulfil its mandate, the Commission urged the Group to proceed expeditiously with the completion of the draft uniform rules. An appeal was made to all delegations to renew their commitment to active participation in the building of a consensus with respect to the scope and content of the draft uniform rules.[8]

382. The Working Group continued its work at its thirty-fifth (September 1999) and thirty-sixth (February 2000) sessions on the basis of notes prepared by the Secretariat (A/CN.9/WG.IV/WP. 82 and 84). At the current session, the Commission had before it the report of the Working Group on the work of those two sessions (A/CN.9/465 and 467, respectively). It was noted that the Working Group, at its

thirty-sixth session, had adopted the text of articles 1 and 3-12 of the uniform rules. Some issues remained to be clarified as a result of the decision by the Working Group to delete the notion of enhanced electronic signature from the draft uniform rules. A concern was expressed that, depending on the decisions to be made by the Working Group with respect to articles 2 and 13, the remainder of the draft provisions might need to be re-examined to avoid creating a situation where the standard set by the uniform rules would apply equally to electronic signatures that ensured a high level of security and to low-value certificates that might be used in the context of electronic communications that were not intended to carry significant legal effect.

383. After discussion, the Commission expressed its appreciation for the efforts made by the Working Group and the progress achieved in the preparation of the draft uniform rules on electronic signatures. The Working Group was urged to complete its work with respect to the draft uniform rules at its thirty-seventh session and to review the draft guide to enactment to be prepared by the Secretariat.

B. Future work in the field of electronic commerce

384. The Commission held a preliminary exchange of views regarding future work in the field of electronic commerce. Three topics were suggested as indicating possible areas where work by the Commission would be desirable and feasible. The first dealt with electronic contracting, considered from the perspective of the United Nations Sales Convention, which was generally felt to constitute a readily acceptable framework for on-line contracts dealing with the sale of goods. It was pointed out that, for example, additional studies might need to be undertaken to determine the extent to which uniform rules could be extrapolated from the United Nations Sales Convention to govern dealings in services or "virtual goods", that is, items (such as software) that might be purchased and delivered in cyberspace. It was widely felt that, in undertaking such studies, careful attention would need to be given to the work of other international organizations such as the World Intellectual Property Organization (WIPO) and the World Trade Organization.

385. The second topic was dispute settlement. It was noted that the Working Group on Arbitration had already begun discussing ways in which current legal instruments of a statutory nature might need to be amended or interpreted to authorize the use of electronic documentation and, in particular, to do away with existing requirements regarding the written form of arbitration agreements. It was generally agreed that further work might be undertaken to determine whether specific rules were needed to facilitate the increased use of on-line dispute settlement mechanisms. In that context, it was suggested that special attention might be given to the ways in which dispute settlement techniques such as arbitration and conciliation might be made available to both commercial parties and consumers. It was widely felt that the increased use of electronic commerce tended to blur the distinction between consumers and commercial parties. However, it was recalled that, in a number of countries, the use of arbitration for the settlement of consumer disputes was restricted for reasons involving public policy considerations and might not easily lend itself to harmonization by international organizations. It was also felt that attention should be paid to the work undertaken in that area by other organizations, such as the International Chamber of Commerce (ICC), the Hague

Conference on Private International Law and WIPO, which was heavily involved in dispute settlement regarding domain names on the Internet.

386. The third topic was dematerialization of documents of title, in particular in the transport industry. It was suggested that work might be undertaken to assess the desirability and feasibility of establishing a uniform statutory framework to support the development of contractual schemes currently being set up to replace traditional paper-based bills of lading by electronic messages. It was widely felt that such work should not be restricted to maritime bills of lading, but should also envisage other modes of transportation. In addition, outside the sphere of transport law, such a study might also deal with issues of dematerialized securities. It was pointed out that the work of other international organizations on those topics should also be monitored.

387. After discussion, the Commission welcomed the proposal to undertake studies on the three topics. While no decision as to the scope of future work could be made until further discussion had taken place in the Working Group on Electronic Commerce, the Commission generally agreed that, upon completing its current task, namely, the preparation of draft uniform rules on electronic signatures, the Working Group would be expected, in the context of its general advisory function regarding the issues of electronic commerce, to examine, at its first meeting in 2001, some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission at its subsequent meeting. It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.

388. Particular emphasis was placed by the Commission on the need to ensure coordination of work among the various international organizations concerned. In view of the rapid development of electronic commerce, a considerable number of projects with possible impact on electronic commerce were being planned or undertaken. The Secretariat was requested to carry out appropriate monitoring and to report to the Commission as to how the function of coordination was fulfilled to avoid duplication of work and ensure harmony in the development of the various projects. The area of electronic commerce was generally regarded as one in which the coordination mandate given to UNCITRAL by the General Assembly could be exercised with particular benefit to the global community and deserved corresponding attention from the Working Group and the Secretariat.

VI. Settlement of commercial disputes

389. At its thirty-first session, the Commission held a special commemorative New York Convention Day on 10 June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). In addition to representatives of States members of the Commission and observers, some 300 invited persons participated in the event. The Secretary-General made the opening speech. In addition to speeches by participants in the diplomatic conference that had adopted the Convention, leading arbitration experts presented reports on matters such as the promotion of the Convention, its enactment and application. Reports were also made on matters beyond the Convention itself, such as the interplay between the Convention and other international legal texts on international commercial arbitration and on difficulties encountered in practice but addressed in existing legislative or non-legislative texts on arbitration.[9]

390. In reports presented at the commemorative conference, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any related work by the Commission would be desirable and feasible. At its thirty-first session, in 1998, with reference to the discussions at the New York Convention Day, the Commission had considered that it would be useful to engage in a discussion of possible future work in the area of arbitration at its thirty-second session, in 1999 and had requested the Secretariat to prepare a note that would serve as a basis for the considerations of the Commission.[10]

391. At its thirty-second session, in 1999, the Commission had had before it the note it had requested, entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460).[11] Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission had generally considered that the time had arrived to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[12]

392. When the Commission discussed the topic, it left open the question of what form its future work might take. It was agreed that decisions on the matter should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide). It was stressed that, even if an international treaty were to be considered, it was not intended to be a modification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[13]

393. The Commission entrusted the work to one of its three working groups, which it named Working Group on Arbitration, and decided that the priority items for the Working Group should be conciliation,[14] requirement of written form for the

arbitration agreement,[15] enforceability of interim measures of protection[16] and possible enforceability of an award that had been set aside in the State of origin.[17]

394. At its current session, the Commission had before it the report of the Working Group on Arbitration, which had held its thirty-second session in Vienna from 20 to 31 March 2000 (A/CN.9/468).

395. The Commission took note of the report with satisfaction and commended the work accomplished so far. Various observations were made to the effect that the work on the items on the agenda of the Working Group was timely and necessary in order to foster the legal certainty and predictability in the use of arbitration and conciliation in international trade. The Working Group, in addition to the topics referred to it as a matter of priority, had identified a number of other topics, with various levels of priority, that had been suggested for possible future work (A/CN.9/468, paras. 107-109). The Commission reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with those topics.

396. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 New York Convention (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (para. 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention (para. 109 (i)); and the power by the arbitral tribunal to award interest (para. 107 (j)). It was noted with approval that, with respect to "on-line" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (para. 107 (m)), the view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.

397. The Commission heard statements by observers on behalf of the Chartered Institute of Arbitrators and the International Union of Lawyers. In addition to expressing appreciation for the work on arbitration and conciliation by the Commission and commenting on various items considered by the Working Group, they offered to assist in that work. The Commission took note of those statements with appreciation.

398. The Commission took note of paragraph 115 of the report of the Working Group referring to the considerations of the ECE Advisory Group on the European Convention on International Commercial Arbitration. The Advisory Group had concluded, *inter alia*, that the European Convention (Geneva, 1961) (a) remained useful; (b) had utility beyond that of existing conventions (in particular, as a

common set of minimum standards to be observed in international arbitration); and (c) could be made even more useful to both existing and potential new contracting States if it were updated. The Commission also noted the recommendation of the Advisory Group to modify article IV of the Convention and the Agreement relating to Application of the European Convention on International Commercial Arbitration and that no consensus had been reached as to whether any additional changes to the Convention should be made.

399. The Commission called for coordination between the Working Group on Arbitration and the ECE Advisory Group. It was of the view that the ECE work should not overlap the work undertaken at the global level by the Commission. It was also of the view that issues arising from the European Convention beyond those in article IV were of universal interest and that, if it was found that they required work at the international level, the Commission, because of its universal representation and tradition in working in the area of international commercial arbitration, was the proper forum to undertake such work, in cooperation with ECE. The Commission appealed to States members of the Commission and observer States to coordinate within their respective Governments the work of their delegates in the two organizations considering international commercial arbitration.

VII. Insolvency law

400. At its thirty-second session, in 1999, the Commission had had before it a proposal by Australia (A/CN.9/462/Add.1) on possible future work in the area of insolvency law. The proposal referred to recent regional and global financial crises and the work undertaken in international forums in response to those crises. Reports from those forums stressed the need to strengthen the international financial system in three areas: transparency, accountability and management of international financial crises by domestic legal systems. According to those reports, strong insolvency and debtor-creditor regimes were important means of preventing or limiting financial crises and of facilitating rapid and orderly workouts from excessive indebtedness. The proposal before the Commission recommended that, in view of its universal membership, its previous successful work on cross-border insolvency and its established working relations with international organizations that had expertise and interest in the law of insolvency, the Commission was an appropriate forum for insolvency to be included in its agenda. The proposal urged that the Commission consider entrusting a working group with the development of a model law on corporate insolvency to foster and encourage the adoption of effective national corporate insolvency regimes.

401. The Commission had expressed its appreciation for the proposal. It noted that different work projects had been undertaken by other international organizations such as the International Monetary Fund (IMF), the World Bank and the International Bar Association on the development of standards and principles for insolvency regimes. The broad objective of those organizations, while differing in scope and working methods as a consequence of their respective mandates and membership, was to modernize insolvency practices and laws. The initiatives taken in those organizations demonstrated the need to assist States in reassessing their insolvency laws and practices. Those various initiatives, however, also needed strengthened coordination, where appropriate, so as to avoid inefficient duplication of work and to achieve consistent results.

402. Recognition was expressed in the Commission for the importance to all countries of strong insolvency regimes. It was felt that the type of insolvency regime that a country had adopted had become a "front-line" factor in international credit ratings. Concern was expressed, however, about the difficulties associated with work at the international level on insolvency legislation, which involved sensitive and potentially diverging socio-political choices. In view of those difficulties, it was feared that the work might not be brought to a successful conclusion. A universally acceptable model law was in all likelihood not feasible and any work to be done needed to take a flexible approach that would leave options and policy choices open to States. While the Commission heard expressions of support for such flexibility, it was generally agreed that the Commission could not take a final decision on committing itself to establishing a working group to develop model legislation or another text without further study of the work already being undertaken by other organizations and consideration of the relevant issues.

403. To facilitate that further study, the Commission had decided that one session of a working group should be held to ascertain what, in the current landscape of efforts, would be an appropriate product (such as a model law, model provisions, a set of principles or other type of text) and to define the scope of the issues to be

included in that product. It was pointed out that the importance and urgency of work on insolvency law had been identified in a number of international organizations and there was wide agreement that more work was required in order to foster the development and adoption of effective national corporate insolvency regimes.[18] Pursuant to that decision, the Working Group on Insolvency Law had held an exploratory session in Vienna from 6 to 17 December 1999.

404. At its thirty-third session, the Commission had before it the report of the Working Group on the work of its twenty-second session (A/CN.9/469).

405. It was noted that the Working Group had considered key objectives of an insolvency regime and a number of core features of a national insolvency regime. The Working Group had then reviewed various possible forms that an instrument that the Commission might decide to prepare might take, such as a comparative study, a guide that outlined practices and policy choices, a legislative guide with a similar approach as the legislative guide on privately financed infrastructure projects and model statutory provisions. It was also noted that the Working Group had agreed that a universal, one-size-fits-all solution would not be feasible or desirable. However, there was agreement in the Working Group that a legislative approach should be followed (A/CN.9/469, paras. 125-134).

406. The Commission welcomed the report of the Working Group on Insolvency Law. There was general agreement in the Commission that a single model law on insolvency was neither feasible nor necessary. It was not feasible because national laws took different approaches and were making different policy choices in the area of insolvency law; it was therefore unrealistic to expect that a single universal model might be agreed upon. It was also not necessary to promote a single model, since it was more important for the facilitation of international trade to have a consistent and predictably applied insolvency regime than a uniform regime.

407. The Commission took note of the discussions in the Working Group concerning the possible need for a statutory text governing informal insolvency procedures including out-of-court restructuring, which would also include the possibility of binding dissenting creditors (A/CN.9/469, paras. 105–121). Reservations were expressed in the Commission regarding the proposition of developing such a regime. It was argued that informality and flexibility were important hallmarks of negotiations aiming at out-of-court restructuring and that subjecting such an informal process to scrutiny by a court or another body might disturb the process in an undesirable manner. It was also said that the best way to foster out-of-court restructuring procedures was to set up an effectively functioning regime governing formal, court-supervised insolvency proceedings. It was therefore suggested that any work on out-of-court restructuring should be considered together with, and in the broader context of, work towards a modern national insolvency regime.

408. Several references were made to the fact that various international organizations were considering (from different perspectives and aiming at not necessarily the same issues) the modernization of national insolvency regimes. Those organizations included, in particular, the World Bank, IMF, the Asian Development Bank, the International Federation of Insolvency Professionals (INSOL International) and Committee J of the International Bar Association. If the

Working Group were to be given a mandate to continue its work, the views and results of work of those organizations should be taken into account in preparing the documentation for the Working Group. It was therefore suggested that a colloquium should be held (similar to the UNCITRAL/INSOL Colloquium held in Vienna in 1994, which had preceded the work leading to the subsequent adoption of the UNCITRAL Model Law on Cross-Border Insolvency (see A/CN.9/398). On behalf of INSOL International and Committee J of the International Bar Association, an offer was made to cooperate with the Secretariat in organizing such a colloquium before the next session of the Working Group so as to facilitate considerations in the Group.

409. The Commission noted the recommendation that the Working Group had made in its report (A/CN.9/398, para. 140) and fully accepted it by giving the Group the mandate to prepare a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches. A legislative guide similar to that adopted by the Commission for privately financed infrastructure projects would be useful and could contain model legislative provisions, where appropriate. It was agreed that in carrying out its task the Working Group should be mindful of the work under way or already completed by other organizations, including IMF, the World Bank, the Asian Development Bank, INSOL International and the International Bar Association. It was noted that, in order to obtain the views and benefit from the expertise of those organizations, the Secretariat would organize a colloquium before the next session of the Working Group, in cooperation with INSOL International and the International Bar Association, as had been offered by those organizations.

VIII. Monitoring the implementation of the 1958 New York Convention

410. It was recalled that the Commission, at its twenty-eighth session, in 1995, had approved the project, undertaken jointly with Committee D of the International Bar Association, aimed at monitoring the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[19] It was stressed that the purpose of the project, as approved by the Commission, was limited to that aim and, in particular, that its purpose was not to monitor individual court decisions applying the Convention. In order to be able to prepare a report on the subject, the Secretariat had sent to the States parties to the Convention a questionnaire relating to the legal regime in those States governing the recognition and enforcement of foreign awards.

411. As at the beginning of the thirty-third session of the Commission, the Secretariat had received 59 replies to the questionnaire (and of a current total of 121 States parties).

412. The Commission repeated its appeal to States parties to the Convention that had not yet replied to the questionnaire to do so as soon as possible or, to the extent necessary, to inform the Secretariat about any new developments since their previous replies to the questionnaire. The Secretariat was requested to prepare, for a future session of the Commission, a note presenting the findings based on an analysis of the information gathered.

IX. Case law on UNCITRAL texts

413. The Commission noted with appreciation the ongoing work under the system that had been established for the collection and dissemination of case law on UNCITRAL texts (CLOUT). It was noted that CLOUT was a most important means of promoting the uniform interpretation and application of UNCITRAL texts by enabling interested persons, such as judges, arbitrators, lawyers or parties to commercial transactions to take into account decisions and awards of other jurisdictions when rendering their own judgements or opinions or adjusting their actions to the prevailing interpretation of those texts.

414. The Commission expressed appreciation to the national correspondents for their valuable work in the collection of relevant decisions and arbitral awards and their preparation of case abstracts. It also expressed its appreciation to the Secretariat for compiling, editing, issuing and distributing case abstracts. It was noted that, whereas 62 jurisdictions had appointed national correspondents, there were another 26 jurisdictions that had not yet done so. Those jurisdictions would be entitled to make such an appointment either by virtue of their being party to an UNCITRAL convention currently in force or by having adopted legislation based on an UNCITRAL model law. Noting the importance of uniform reporting from all jurisdictions, the Commission urged States that had not yet done so to appoint a national correspondent. It also urged Governments to assist their national correspondents to the extent possible in their work.

415. It was also noted that the number of States adhering to conventions or enacting legislation based on model laws drawn up by the Commission had increased significantly. The concern was expressed that, with the resultant increase in the caseload, the continuation of CLOUT would be at risk without a significant increase in the human and financial resources available to the secretariat of the Commission.

X. Transport law

416. It was recalled that at its twenty-ninth session, in 1996, the Commission had requested the Secretariat to be the focal point for gathering information, ideas and opinions as to problems in transport law that arose in practice and possible solutions to those problems. Such information-gathering should be broadly based and should include among its sources, in addition to Governments, international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the International Maritime Committee (CMI), ICC, the International Union of Marine Insurance, the International Federation of Freight Forwarders' Associations, the International Chamber of Shipping and the International Association of Ports and Harbours.[20]

417. At its thirty-first session, in 1998, the Commission heard a statement on behalf of CMI to the effect that it welcomed the invitation to cooperate with the Secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information. That analysis would allow the Commission to take an informed decision as to the desirable course of action.[21] Strong support had been expressed at that session by the Commission for the exploratory work being undertaken by CMI and the secretariat of the Commission. The Commission expressed its appreciation to CMI for its willingness to embark on that important and far-reaching project, for which few or no precedents existed at the international level; the Commission was looking forward to being apprised of the progress of the work and to considering the opinions and suggestions resulting from it.[22]

418. At the thirty-second session of the Commission, in 1999, it was reported on behalf of CMI that the Assembly and the Executive Council of CMI had welcomed the initiative to collect data on issues related to international transport law that had so far not been internationally harmonized and that a CMI working group had been instructed to prepare a study on a broad area of issues in international transport law with the aim of identifying the areas where unification or harmonization were needed by the industries involved. In undertaking the study, it had been realized that the industries involved were extremely interested in pursuing the project and had offered their technical and legal knowledge to assist in that endeavour. Based on that favourable reaction and the preliminary findings of the CMI working group, it appeared that further harmonization in the field of transport law would greatly benefit international trade. The working group had found a number of issues that had not been covered by the current unifying instruments. Some of the issues were regulated by national laws, which, however, were not internationally harmonized. Evaluated in the context of electronic commerce, that lack of harmonization became even more significant. It was also reported that the working group had identified numerous interfaces between the different types of contracts involved in international trade and transport of goods (such as sales contracts, contracts of carriage, insurance contracts, letters of credit, freight forwarding contracts, as well as a number of other ancillary contracts). The working group intended to clarify the nature and function of those interfaces and to collect and analyse the rules currently governing them. That exercise would at a later stage include a re-evaluation of principles of liability as to their compatibility with a broader area of rules on the carriage of goods.

419. At the same session, the Commission had expressed its appreciation to CMI for having acted upon its request for cooperation and had requested the Secretariat to continue to cooperate with CMI in gathering and analysing information. The Commission was looking forward to receiving a report at a future session presenting the results of the study and proposals for future work.[23]

420. At the current session, the Commission had before it a report of the Secretary-General on possible future work in transport law (A/CN.9/476), which described the progress of the work carried out by CMI in cooperation with the secretariat of the Commission. It also heard an oral report on behalf of CMI. In cooperation with the secretariat of the Commission, the CMI working group had launched an investigation based on a questionnaire covering different legal systems addressed to the CMI member organizations. At the same time, a number of round-table meetings had been held in order to discuss features of the future work with international organizations representing various industries. Those meetings showed the continued support and interest of the industry in the project.

421. Pursuant to the receipt of replies to the questionnaire, CMI had created an international subcommittee with a view to analysing the information and finding a basis for further work towards harmonizing the law in the area of international transport of goods. It was reported that the enthusiasm encountered so far in the industry and the provisional findings about the areas of law that needed further harmonization made it likely that the project would be eventually transformed into a universally acceptable harmonizing instrument.

422. In the course of the discussions in the CMI subcommittee, it had been noted that although bills of lading were still used, especially where a negotiable document was required, the actual carriage of goods by sea sometimes represented only a fragment of an international transport of goods. In the container trade, even a port-to-port bill of lading would involve receipt and delivery at some point not directly connected with the loading onto, or discharge from, the ocean vessel. Moreover, in most situations it was not possible to take delivery alongside the vessel. Furthermore, where different modes of transport were used, there were often gaps between mandatory regimes applying to the various transport modes involved. It had been proposed, therefore, that in developing an internationally harmonized regime covering the relationships between the parties to the contract of carriage for the full duration of the carrier's custody of the cargo, issues that arose in connection with activities that were integral to the carriage agreed to by the parties and that took place before loading and after discharge should also be considered, as well as issues that arose under shipments where more than one mode of transport was contemplated. Furthermore, while the emphasis of the work, as originally conceived, had been on the review of areas of law governing the transport of goods that had not previously been covered by international agreement, it had been increasingly felt that the current broadly based project should be extended to include an updated liability regime that would complement the terms of the proposed harmonizing instrument.

423. The Commission took note with satisfaction of the report of the Secretary-General (A/CN.9/476) and heard with pleasure the oral report on behalf of CMI of the preliminary work accomplished thus far.

424. Several statements were made in the Commission to the effect that the time had come to pursue actively harmonization in the area of the carriage of goods by sea, that increasing disharmony in the area of international carriage of goods was a source of concern and that it was necessary to provide a certain legal basis to modern contract and transport practices. The carriage of goods by sea was increasingly part of a warehouse-to-warehouse operation and that factor should be borne in mind in conceiving future solutions. Approval was expressed for a concept of work that went beyond liability issues and dealt with the contract of carriage in such a way that it would facilitate the export-import operation, which included the relationship between the seller and the buyer (and possible subsequent buyers) as well as the relationship between the parties to the commercial transaction and providers of financing. It was recognized that such a broad approach would involve some re-examination of the rules governing the liability for loss of or damage to goods.

425. It was observed that the work of some regional organizations, such as the Organization of American States and ECE, were currently considering transport law issues. It was considered that the texts already formulated in those organizations would be useful in the work of the Commission and also that the work in those organizations would be facilitated by universally applicable texts to be developed in the Commission. It was observed that ECE was currently considering whether to undertake work on uniform rules for the multimodal transport of goods. Concern was expressed that, if any such work were to be undertaken by an organization in which not all regions of the world were represented, it would interfere with efforts to prepare a universally applicable regime. Hope was expressed that the organizations concerned would coordinate their work so as to avoid duplication and that States would be mindful of the need for coordination within their own administrations of the work of their delegates in those organizations.

426. The Commission took note of the fact that the Secretariat was organizing in cooperation with CMI a Transport Law Colloquium to be held on 6 July 2000 in the context of the current session of the Commission. The purpose of the Colloquium was to gather ideas and expert opinions on problems that arose in the international carriage of goods, in particular the carriage of goods by sea, and to incorporate that information into the report to be presented to the Commission at its thirty-fourth session, in 2001.

427. The Commission was pleased with the progress made since its thirty-second session. It welcomed the fruitful cooperation between CMI and the Secretariat. Several statements were made to the effect that it was necessary throughout the preparatory work to involve the other interested organizations, including those representing the interests of cargo owners. It was stressed that only by ensuring the cooperation of all interested industries at all stages of the preparatory work was there hope to develop a regime that would be both broadly acceptable and capable of being implemented within a short span of time. The Commission requested the Secretariat to continue to cooperate actively with CMI with a view to presenting, at the next session of the Commission, a report identifying issues in transport law in respect of which the Commission might undertake future work and, to the extent possible, also presenting possible solutions.

XI. Endorsement of texts of other organizations: Incoterms 2000, ISP98 and URCB

428. The Commission had before it three reports of the Secretary-General requesting the Commission's endorsement of (a) the International Standby Practices (ISP98), (b) the Uniform Rules for Contract Bonds (URCB) and (c) Incoterms 2000 (A/CN.9/477, A/CN.9/478 and A/CN.9/479, respectively).

429. It was recalled that at its thirty-second session the Commission had been requested by the Institute of International Banking Law and Practice to consider recommending for worldwide use the Rules on International Standby Practices (ISP98), as endorsed by the Commission on Banking Technique and Practice of ICC. The Commission had also been notified of a request from the Secretary-General of ICC that the Commission consider giving its formal recognition and endorsement of URCB. In order to allow consideration of those requests, the Commission had before it the text of ISP98 (A/CN.9/459) and of URCB (A/CN.9/459/Add.1). However, while several delegations had indicated their desire to endorse the texts of ISP98 and URCB at that session, some delegations had indicated that, owing to the fact that late publication of the documents containing the latter text had prevented them from carrying out the consultations required prior to endorsement, they were not prepared to endorse the texts of ISP98 and URCB at that session. The Commission had regretfully felt obliged to postpone consideration of endorsement until the thirty-third session.[24]

430. At the thirty-third session, as had already been the case at the thirty-second session, reference was made to the importance of ISP98 as private rules of practice intended to apply to standby letters of credit. It was pointed out that the idea of preparing such rules had been conceived during the deliberations of the UNCITRAL Working Group on International Contract Practices, which had resulted in the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. The ISP98 Rules had been formulated to complement the Convention. The ISP98 drafting process itself had been undertaken in regular consultation with the UNCITRAL secretariat and had also been used as an opportunity to promote adoption of the Convention. In that context, the Commission recalled with particular appreciation that adoption of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit had been recommended to Governments by the Banking Commission of ICC. Reference was also made to the importance of URCB as a commendable practical tool and to the need for wider awareness of that instrument.

431. The Commission welcomed the opportunity to foster its cooperation with ICC. It was recalled that the Commission had endorsed Incoterms 1990 at its twenty-fifth session, in 1992,[25] and the Uniform Customs and Practice for Documentary Credits (UCP 500) at its twenty-seventh session, in 1994,[26] while it was generally felt that the technical quality of ISP98 and URCB made those instruments worthy of wider dissemination and use in international trade, a question was raised as to the meaning of an endorsement of those instruments by the Commission. It was pointed out that, in a number of countries, not all provisions of ISP98 would be in conformity with existing legal rules, which might not fully recognize, for example, the role of stand-by letters of credit as independent guarantees. In that connection, concern was expressed that the notion of "endorsement" (which in a number of language versions

was a synonym for "approval") should not be misinterpreted as indicating that, once they had been "endorsed", the instruments in their totality would necessarily become applicable in any country.

432. In response to that concern, it was generally agreed that, in the context of legal instruments emanating from other international organizations, "endorsement" should be interpreted as an indication by the Commission that those instruments were commended for use by the parties as a record of good international commercial practices. However, such an "endorsement" should carry no implication as to the conformity of those instruments with existing law. In addition, it was pointed out that the text of ISP98 itself made it clear that it was not intended to displace any provision of applicable law, since article 1.02.a indicated that the rules contained in ISP98 were intended to "supplement the applicable law to the extent not prohibited by that law".

433. With respect to Incoterms 2000, consistent with its previous endorsement of the text of Incoterms 1990 at its twenty-fifth session, in 1992,[25] the Commission expressed its appreciation for the efforts that had led to the development of those rules of practice and welcomed the request for their endorsement.

434. After discussion, the Commission adopted the following decision, endorsing the text of Incoterms 2000, ISP98 and URCB:

> *The United Nations Commission on International Trade Law,*
>
> *Expressing its appreciation* to the International Chamber of Commerce for having transmitted to it the revised text of Incoterms 2000, the Rules on International Standby Practices (ISP98) and the Uniform Rules for Contract Bonds (URCB),
>
> *Congratulating* the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by revising Incoterms to adapt them to contemporary commercial practice, by adopting the Rules on International Standby Practices (ISP98), as prepared by the Institute of International Banking Law and Practice, and by elaborating the Uniform Rules for Contract Bonds (URCB),
>
> *Noting* that Incoterms 2000, the Rules on International Standby Practices (ISP98) and the Uniform Rules for Contract Bonds (URCB) constitute a valuable contribution to the facilitation of international trade,
>
> *Commends* the use of Incoterms 2000, the Rules on International Standby Practices (ISP98) and the Uniform Rules for Contract Bonds (URCB) by the parties in international trade and financing transactions.

XII. Training and technical assistance

435. The Commission had before it a note by the Secretariat (A/CN.9/473) setting forth the activities undertaken since its thirty-second session and indicating the direction of future activities being planned, in particular in view of the increase in the requests received by the Secretariat. It was noted that training and technical assistance activities were typically carried out through seminars and briefing missions, which were designed to explain the salient features of UNCITRAL texts and the benefits to be derived from their adoption by States.

436. It was reported that, since the previous session, the following seminars and briefing missions had been organized: Johannesburg, South Africa (6 and 7 May 1999); Stellenbosch, South Africa (9 and 10 May 1999); Pretoria (11 and 12 May 1999); Yaoundé (10-12 May 1999); Abidjan (13 and 14 May 1999); Rio de Janeiro, Brazil (12 and 13 August 1999); Lima (19 and 20 August 1999); Cuzco, Peru (23-25 August 1999); Brasilia (30 and 31 August 1999); São Paulo, Brazil (2 and 3 September 1999); Moscow (2-4 November 1999); and Antananarivo (6-8 March 2000). The secretariat of the Commission reported that a number of requests had had to be turned down for lack of sufficient resources and that for the remainder of 2000 only some of the requests made by countries in Africa, Asia, Latin America and Eastern Europe could be met.

437. The Commission expressed its appreciation to the Secretariat for the activities undertaken since its previous session and emphasized the importance of the training and technical assistance programme for promoting awareness and the wider adoption of the legal texts it had produced. Training and technical assistance were particularly useful for developing countries lacking expertise in the areas of trade and commercial law covered by the work of UNCITRAL and the training and technical assistance activities of the Secretariat could play an important role in the economic integration efforts being undertaken by many countries.

438. The Commission noted the various forms of technical assistance that might be provided to States preparing legislation based on UNCITRAL texts, such as review of preparatory drafts of legislation from the point of view of UNCITRAL texts, preparation of regulations implementing such legislation and comments on reports of law reform commissions, as well as briefings for legislators, judges, arbitrators, procurement officials and other users of UNCITRAL texts as embodied in national legislation. The upsurge in commercial law reform represented a crucial opportunity for the Commission to further significantly the objectives of substantial coordination and acceleration of the process of harmonization and unification of international trade law, as envisaged by the General Assembly in its resolution 2205 (XXI) of 17 December 1966.

439. The Commission took note with appreciation of the contributions made by Canada, Cyprus, Greece, Mexico, Switzerland and the United Kingdom of Great Britain and Northern Ireland towards the seminar programme. It also expressed its appreciation to Singapore for its contribution to the Trust Fund for Granting Travel Assistance to Developing States members of UNCITRAL. The Commission furthermore expressed its appreciation to those other States and organizations which had contributed to its programme of training and assistance by providing funds or staff or by hosting seminars. Stressing the importance of extrabudgetary funding for carrying out training and technical assistance activities, the Commission appealed

once again to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL trust funds so as to enable the secretariat of the Commission to meet the increasing demands in developing countries and newly independent States for training and assistance and to enable delegates from developing countries to attend UNCITRAL meetings. It was also suggested that, in order to resolve the resource difficulties facing the Commission, an attempt should be made to encourage the private sector to contribute to the financing of the UNCITRAL assistance and training programme, in particular since the private sector benefited a great deal from the overall work of the Commission in the area of international trade law.

440. In view of the limited resources available to the secretariat of the Commission, whether from budgetary or extrabudgetary resources, strong concern was expressed that the Commission could not fully implement its mandate with regard to training and technical assistance. Concern was also expressed that, without effective cooperation and coordination between the Secretariat and development assistance agencies providing or financing technical assistance, international assistance might lead to the adoption of national laws that did not represent internationally agreed standards, including UNCITRAL conventions and model laws.

441. As regards the internship programme of the secretariat of the Commission, concern was expressed that the majority of the participants were nationals of developed countries. An appeal was made to all States to consider supporting programmes that sponsored the participation of nationals of developing countries in the internship programme.

442. In order to ensure the effective implementation of its training and assistance programme and the timely publication and dissemination of its work, the Commission decided to recommend to the General Assembly that it request the Secretary-General to increase substantially both the human and the financial resources available to its secretariat.

XIII. Status and promotion of UNCITRAL texts

443. On the basis of a note by the Secretariat (A/CN.9/462), the Commission considered the status of the conventions and model laws emanating from its work, as well as the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The Commission noted with pleasure the new action of States and jurisdictions subsequent to 4 June 1999 (date of the conclusion of the thirty-second session of the Commission) regarding the following instruments:

(a) Convention on the Limitation Period in the International Sale of Goods, concluded at New York on 14 June 1974, as amended by the Protocol of 11 April 1980. Number of States parties: 17;

(b) [Unamended] Convention on the Limitation Period in the International Sale of Goods (New York, 1974). Number of States parties: 24;

(c) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). Number of States parties: 26;

(d) United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). Number of States parties: 56;

(e) United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988). The Convention has two States parties; it requires eight additional adherences for entry into force;

(f) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991). The Convention has two States parties; it requires three additional adherences for entry into force;

(g) United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995). The Convention has five States parties;

(h) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Number of States parties: 121;

(i) UNCITRAL Model Law on International Commercial Arbitration, 1985. New jurisdiction that has enacted legislation based on the Model Law: Macau Special Administrative Region of China;

(j) UNCITRAL Model Law on International Credit Transfers, 1992;

(k) UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994;

(l) UNCITRAL Model Law on Electronic Commerce, 1996. New jurisdictions that have enacted legislation based on the Model Law: Australia, Bermuda, France and Hong Kong Special Administrative Region of China. Uniform legislation influenced by the Model Law and the principles on which it is based has been prepared in Canada and in the United States of America;

(m) UNCITRAL Model Law on Cross-Border Insolvency, 1997. New jurisdictions that have enacted legislation based on the Model Law: Eritrea and Mexico.

444. Appreciation was expressed for those legislative actions on the texts of the Commission. A request was directed to States that had enacted or were about to enact a model law prepared by the Commission, or were considering legislative action regarding a convention resulting from the work of the Commission, to inform the secretariat of the Commission thereof. Such information would be useful to other States in their consideration of similar legislative action.

445. Representatives and observers of a number of States reported that official action was being considered with a view to adherence to various conventions and to the adoption of legislation based on various model laws prepared by UNCITRAL. It was noted that the UNCITRAL Model Law on Electronic Commerce had become the single common source often cited by many countries.

446. It was noted that, despite the universal relevance and usefulness of those texts, a number of States had not yet enacted any of them. An appeal was directed to the representatives and observers who had been participating in the meetings of the Commission and its working groups to contribute, to the extent that they in their discretion deemed appropriate, to facilitating consideration by legislative organs in their countries of texts of the Commission.

XIV. General Assembly resolution on the work of the Commission

447. The United Nations Commission on International Trade Law took note with appreciation of General Assembly resolution 54/103 of 9 December 1999 on the report of the Commission on the work of its thirty-second session. In particular, the Commission noted with appreciation that, in paragraph 2 of that resolution, the Assembly had commended the Commission for the progress made in its work on receivables financing, electronic commerce, privately financed infrastructure projects and the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York on 10 June 1958.

448. The Commission also noted with appreciation that, in paragraph 3 of resolution 54/103, the General Assembly had appealed to Governments that had not yet done so to reply to the questionnaire circulated by the Secretariat in relation to the legal regime governing the recognition and enforcement of foreign arbitral awards.

449. The Commission further noted with appreciation that, in paragraph 5 of resolution 54/103, the Assembly had reaffirmed the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in that field, and in that connection had called upon all bodies of the United Nations system and invited other international organizations to bear in mind the mandate of the Commission and the need to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law, and had recommended that the Commission, through its secretariat, continue to maintain close cooperation with the other international organs and organizations, including regional organizations, active in the field of international trade law.

450. The Commission noted with appreciation the decision of the General Assembly, in paragraph 6 of resolution 54/103, to reaffirm the importance, in particular for developing countries, of the work of the Commission concerned with training and technical assistance in the field of international trade law, such as assistance in the preparation of national legislation based on legal texts of the Commission, and that, in paragraph 7, the Assembly had expressed the desirability for increased efforts by the Commission, in sponsoring seminars and symposia, to provide such training and assistance.

451. The Commission also noted with appreciation the appeal by the General Assembly, in paragraph 7 (b) of the resolution, to Governments, the relevant United Nations organs, organizations, institutions and individuals to make voluntary contributions to the UNCITRAL Trust Fund for Symposia and, where appropriate, to the financing of special projects. Furthermore, it was noted that the Assembly had appealed, in paragraph 8, to the United Nations Development Programme and other bodies responsible for development assistance, such as the International Bank for Reconstruction and Development and the European Bank for Reconstruction and Development, as well as to Governments in their bilateral aid programmes, to support the training and technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission.

452. It was also appreciated that the General Assembly, in paragraph 9 of the resolution, had appealed to Governments, the relevant United Nations organs, organizations, institutions and individuals, in order to ensure full participation by all member States in the sessions of the Commission and its working groups, to make voluntary contributions to the trust fund for travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General. (The trust fund was established pursuant to Assembly resolution 48/32 of 9 December 1993.) The Commission further noted with appreciation the decision of the General Assembly, in paragraph 10 of resolution 54/103, to continue, in the competent Main Committee during the fifty-fourth session of the Assembly, its consideration of granting travel assistance, within existing resources, to the least developed countries that were members of the Commission, at their request and in consultation with the Secretary-General.

453. The Commission welcomed the request by the General Assembly, in paragraph 11 of the resolution, to the Secretary-General to ensure and enhance the effective implementation of the programme of the Commission. The Commission noted, however, that the resources available to its secretariat were not sufficient for it to implement its mandate. The Commission noted, in particular, that its secretariat had fewer Professional staff than it had had when the Commission was established. It therefore recommended to the Assembly that it request the Secretary-General to strengthen the secretariat of the Commission, within the resources available to the Secretariat as a whole, so as to enable it to meet the need for increased efforts in trade law unification and harmonization and in trade law reform assistance so as to assist countries in sharing in the benefits of international trade in a global economy.

454. The Commission also noted with appreciation that the General Assembly, in paragraph 12, had stressed the importance of bringing into effect the conventions emanating from the work of the Commission and that to that end it had urged States that had not yet done so to consider signing, ratifying or acceding to those conventions.

XV. Coordination and cooperation: security interests

455. The Commission considered work undertaken by other organizations in the field of security interests on the basis of a report of the Secretary-General (A/CN.9/475). It was noted that the subject of security interests was becoming increasingly important, at both the international level and the national level, in particular in view of the potential of modern secured credit laws to increase the availability of lower-cost credit and thus enhance the cross-border movement of goods and services. It was also noted that a number of texts had been or were currently being prepared that, while indicating certain common trends, left a number of issues unaddressed. The following problems were identified: inadequacy of domestic laws, in particular with regard to international transactions and in view of the fact that mandatory law and public policy issues were involved in secured transactions; the friction resulting from the possibility that more than one country's law might govern a security interest; and the loss of security if the collateral crossed national borders. A wide variety of possible solutions were mentioned, ranging from a model law dealing with security interests in all types of asset, to a statement of principles with a guide, a model law for priority systems based on registration or a convention or model law dealing with particular types of asset (e.g. investment securities or intellectual property).

456. The observer from the secretariat of Unidroit stated that in 1980, after UNCITRAL had assigned low priority to the subject of security interests by discontinuing work for the time being, Unidroit, having invested significant resources, had become the premier organization to undertake and coordinate work in the field of secured credit law. Unidroit's efforts were reflected in two conventions completed and one draft convention being prepared. Furthermore, in 1993, Unidroit had started work on the preparation of a model law on security interests. While the Governing Council of Unidroit had in 1995 assigned low priority to that project in view of the need for Unidroit to complete its work on mobile equipment, once that work was completed, Unidroit could be expected to resume its work on the model law. As a result, it was suggested that UNCITRAL should not undertake overlapping work in the field of security interests, thus avoiding any duplication of efforts. It was also observed that the report of the Secretary-General might have been based on a misunderstanding of the plans of Unidroit in that regard (A/CN.9/475, paras. 8 and 9).

457. In response, it was noted that coordination of the work of other organizations in the field of international trade law was at the heart of the mandate of UNCITRAL as a body in the work of which all States could participate on an equal footing and in all six official languages of the United Nations. It was also noted that the report by the Secretariat accurately reflected the fact that no action had been taken since 1995, since the matter was not on the priority list of Unidroit, as indicated in Unidroit papers, including the Unidroit work programme for the triennium 1999-2001, and confirmed by the observer from the Unidroit secretariat at both the thirty-second and thirty-third sessions of the Commission.[27]

458. The Commission, as the core legal body in the United Nations system in the field of the unification and harmonization of international trade law, reaffirmed its mandate to monitor work carried out in other organizations in the field of international trade law, issuing recommendations, when necessary, and to take any

other action to carry out its mandate. With regard to the concern expressed as to the risk that any work by UNCITRAL in the field of secured credit law might duplicate work carried out in other organizations, the Commission agreed that such a duplication could be avoided with a cautious, measured approach that would focus on particular types of asset. It was widely felt that the topic of security interests was so broad and the issues involved so complex that it would take work by several organizations to address all problems (as to the particular suggestions made, see paras. 460-462 below). It was agreed that it would be the responsibility of all relevant organizations to cooperate with a view to ensuring consistency between the various texts and efficiency in the utilization of resources.

459. Expressing its appreciation for the report of the Secretary-General, the Commission went on to consider the substance of that report. It was generally agreed that security interests was an important subject and had been brought to the attention of the Commission at the right time, in particular in view of the close link of security interests with the work of the Commission on insolvency law. It was widely felt that modern secured credit laws could have a significant impact on the availability and the cost of credit and thus on international trade. Modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties in developed countries and parties in developing countries, and in the share such parties had in the benefits of international trade. A note of caution was struck in that regard to the effect that such laws needed to strike an appropriate balance in the treatment of privileged, secured and unsecured creditors so as to become acceptable to States. It was also stated that, in view of the divergent policies of States, a flexible approach aimed at the preparation of a set of principles with a guide, rather than a model law, would be advisable. Furthermore, in order to ensure the optimal benefits from law reform, including financial-crisis prevention, poverty reduction and facilitation of debt financing as an engine for economic growth, any effort on security interests would need to be coordinated with efforts on insolvency law.

460. As to the focus of any work to be undertaken, a number of suggestions were made. One suggestion was that a uniform law should be prepared to deal with security interests in investment property (e.g. stocks, bonds, swaps and derivatives). Such securities, which were held, as entries in a register, by an intermediary and, physically, by a depositary institution, were important instruments on the basis of which vast amounts of credit were extended not only by commercial banks to their clients but also by central banks to commercial banks. It was also observed that, in view of the globalization of financial markets, a number of jurisdictions were normally involved, the laws of which were often incompatible with each other or even inadequate to address the relevant problems. As a result, a great deal of uncertainty existed as to whether investors owning securities and financiers extending credit and taking a pledge in the securities had a right *in rem* and were protected, in particular, in the case of the insolvency of an intermediary. It was also pointed out that a great deal of uncertainty arose even as to the law applicable to security interests in investment property held by an intermediary and that the fact that the Hague Conference on Private International Law planned to address that matter indicated both its importance and its urgency. In that regard, it was observed that work by UNCITRAL could be perfectly compatible with and could usefully supplement any work undertaken by the Hague Conference, in particular in view of

the inherent limitations of private international law rules in matters of mandatory law and public policy.

461. Another suggestion was that a uniform law should be prepared to deal with security interests in inventory (i.e. a constantly changing pool of tangible assets). It was stated that the use of a changing pool of assets, whether tangible or intangible, was an important feature of modern secured financing law. It was also observed that any work on inventory could usefully draw on the Commission's work on receivables and on practices that would be likely to draw a positive response from international financial markets. The following matters were mentioned as matters that would need to be addressed in such a uniform law: the creation and scope of a security interest (which should include property acquired, and secure debts arising, even after the creation of the interest); remedies upon default of the debtor; clear priority rules; and mechanisms ensuring the transparency of any interest.

462. Yet another suggestion was that a uniform law should be prepared to deal with an international register of security rights. Such a register would enhance certainty and transparency and, as a result, have a positive impact on the availability and the cost of credit, which was badly needed for the development of the world economy. To achieve that result, the register should encompass all types of security interest in all types of asset. In the discussion, the suggestion was made that a colloquium might be held by the Secretariat in cooperation with organizations representing the relevant practice and industry as well as with international development institutions.

463. After discussion, the Commission requested the Secretariat to prepare a study that would discuss in detail the relevant problems in the field of secured credit law and the possible solutions for consideration by the Commission at its thirty-fourth session, in 2001. It was agreed that, after considering the study, the Commission could decide at that session whether further work could be undertaken, on which topic and in which context. It was also agreed that the study could examine, in particular, whether current trends established sufficient common ground among legal systems to make the preparation of a uniform law within a reasonable period of time feasible. It was further agreed that the study could discuss the advantages and disadvantages of the various solutions (i.e. a uniform law on all types of asset as compared with a set of principles with a guide or a uniform law on specific types of asset). Moreover, it was agreed that the study should draw upon and build on work carried out by other organizations and that any suggestions should take into account the need to avoid duplication of efforts.

XVI. Other business

A. Bibliography

464. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/481).

465. The Commission stressed that it was important for it to have information that was as complete as possible with regard to publications, including academic theses, commenting on the results of its work. It therefore requested Governments, academic institutions and other relevant organizations to send copies of such publications to the Secretariat.

B. Willem C. Vis International Commercial Arbitration Moot

466. It was reported to the Commission that the Institute of International Commercial Law at Pace University School of Law, New York, had organized the seventh Willem C. Vis International Commercial Arbitration Moot in Vienna from 15 to 20 April 2000. Legal issues dealt with by the teams of students participating in the Moot had been based on the United Nations Convention on Contracts for the International Sale of Goods, the UNCITRAL Model Law on International Commercial Arbitration and the Arbitration Rules of the London Court of International Arbitration. In the 2000 Moot, some 79 teams had participated from law schools in some 28 countries, involving about 600 students and tutors and about 150 arbitrators. The eighth Moot is to be held at Vienna from 6 to 12 April 2001.

467. The Commission heard the report with interest. Special appreciation was expressed to the Institute of International Commercial Law at Pace University School of Law for organizing the Moot and to the Secretariat for sponsoring it. The Commission regarded the Moot, with its broad international participation, as an excellent method of disseminating information about uniform law texts and teaching international trade law.

C. Date and place of the thirty-fourth session of the Commission

468. It was decided that the Commission would hold its thirty-fourth session in Vienna from 25 June to 13 July 2001.

D. Sessions of working groups

469. The Commission approved the following schedule of meetings for its working groups:

(a) The Working Group on Electronic Commerce is to hold its thirty-seventh session in Vienna from 18 to 29 September 2000 and its thirty-eighth session in New York from 26 February to 9 March 2001;

(b) The Working Group on Arbitration is to hold its thirty-third session in Vienna from 20 November to 1 December 2000 and its thirty-fourth session in New York from 21 May to 1 June 2001;

(c) The Working Group on International Contract Practices is to hold its twenty-third session in Vienna from 11 to 22 December 2000 and its twenty-fourth session, as the Working Group on Insolvency Law, in New York from 26 March to 6 April 2001.

E. Retirement of the Secretary of the Commission

470. The Commission noted that its Secretary, Gerold Herrmann, was to retire on 31 January 2001. Mr. Herrmann had served as member of the Secretariat since 1975 and as Secretary of the Commission since 1991. It was widely recognized that the time during which Mr. Herrmann had served as Secretary of the Commission had been a most productive one and that the secretariat of the Commission under the leadership of Mr. Herrmann had made an excellent contribution to that work despite the limited resources available to it. The Commission expressed its appreciation to Mr Herrmann for his outstanding contribution to the process of unification and harmonization of international trade law in general and to UNCITRAL in particular.

Notes

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 17 were elected by the General Assembly at its forty-ninth session, on 28 November 1994 (decision 49/315), and 19 at its fifty-second session, on 24 November 1997 (decision 52/314). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its forty-ninth session will expire on the last day prior to the opening of the thirty-fourth session of the Commission, in 2001, while the term of those members elected at the fifty-second session will expire on the last day prior to the opening of the thirty-seventh session of the Commission, in 2004.

[2] The election of the Chairman took place at the 676th meeting, on 12 June 2000, the election of the Vice-Chairmen at the 694th and 697th meetings, on 23 and 26 June 2000, respectively, and the election of the Rapporteur at the 687th meeting, on 19 June 2000. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/72/16), para. 14 *(Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970 (United Nations publication, Sales No. E.71.V.1), part two, chap. I, sect. A)).

[3] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 12-307.

[4] Ibid., paras. 127-128.

[5] Ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), paras. 96-114, and ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 185-187.

[6] Ibid., *Fifty-second Session, Supplement No. 17* (A/52/17), paras. 249-251.

[7] Ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), paras. 207-211.

[8] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 308-314.

[9] *Enforcing Arbitration Awards under the New York Convention. Experience and Prospects* (United Nations publication, Sales No. E.99.V.2).

[10] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 235.

[11] The note drew on ideas, suggestions and considerations expressed in different contexts, such as the New York Convention Day (*Enforcing Arbitration Awards under the New York Convention*, op. cit.); the Congress of the International Council for Commercial Arbitration, Paris, 3-6 May 1998 (*Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, International Council for Commercial Arbitration Congress Series No. 9*, Kluwer Law International, 1999); and other international conferences and forums, such as the 1998 Freshfields lecture by Gerold Herrmann, "Does the world need additional uniform legislation on arbitration?" (*Arbitration International*, vol. 15 (1999), No. 3, p. 211).

[12] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

[13] Ibid., paras. 337-376 and 380.

[14] Ibid., paras. 340-343.

[15] Ibid., paras. 344-350.

[16] Ibid., paras. 371-373.

[17] Ibid., paras. 374 and 375.

[18] Ibid., paras. 381-385.

[19] Ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404, and ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), paras. 238-243.

[20] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), paras. 210-215.

[21] Ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), para. 264.

[22] Ibid., para. 266.

[23] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 418.

[24] Ibid., paras. 422-425.

[25] Ibid., *Forty-seventh Session, Supplement No. 17* (A/47/17), para. 161.

[26] Ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), para. 230.

[27] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 420.

Annex I

Draft Convention on Assignment of Receivables in International Trade

(Title, preamble and draft articles 1-17 as adopted by the Commission)*

Preamble

The Contracting States,

Reaffirming their conviction that international trade on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,

Considering that problems created by the uncertainties as to the content and the choice of legal regime applicable to the assignment of receivables constitute an obstacle to international trade,

Desiring to establish principles and adopt rules relating to the assignment of receivables that would create certainty and transparency and promote modernization of law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices,

Desiring also to ensure the adequate protection of the interests of the debtor in the case of an assignment of receivables,

Being of the opinion that the adoption of uniform rules governing the assignment of receivables would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international trade,

Have agreed as follows:

Chapter I
Scope of application

Article 1
Scope of application

1. This Convention applies to:

(a) Assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of the conclusion of the contract of assignment, the assignor is located in a Contracting State; and

* Articles 18-44 of the draft convention and articles 1-7 of the annex to the draft convention, not yet considered by the Commission, appear in annex I to document A/CN.9/466, with an analytical commentary by the Secretariat in document A/CN.9/470 and comments by Governments and international organizations in documents A/CN.9/472 and Add.1-4.

(b) Subsequent assignments provided that any prior assignment is governed by this Convention.

2. This Convention applies to a subsequent assignment that satisfies the criteria of paragraph 1 (a) of this article, notwithstanding that it did not apply to any prior assignment of the same receivable.

3. This Convention does not affect the rights and obligations of the debtor unless, at the time of the conclusion of the original contract, the debtor is located in a Contracting State or the law governing the receivable is the law of a Contracting State.

[4. The provisions of chapter V apply to assignments of international receivables and to international assignments of receivables as defined in this chapter independently of paragraphs 1 and 2 of this article. However, those provisions do not apply if a State makes a declaration under article 37.]

5. The annex to this Convention applies in a Contracting State which has made a declaration under article 40.

Article 2
Assignment of receivables

For the purposes of this Convention:

(a) "Assignment" means the transfer by agreement from one person ("assignor") to another person ("assignee") of all or part of, or an undivided interest in, the assignor's contractual right to payment of a monetary sum ("receivable") from a third person ("the debtor"). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer;

(b) In the case of an assignment by the initial or any other assignee ("subsequent assignment"), the person who makes that assignment is the assignor and the person to whom that assignment is made is the assignee.

Article 3
Internationality

A receivable is international if, at the time of the conclusion of the original contract, the assignor and the debtor are located in different States. An assignment is international if, at the time of the conclusion of the contract of assignment, the assignor and the assignee are located in different States.

Article 4
Exclusions

1. This Convention does not apply to assignments:

(a) Made to an individual for his or her personal, family or household purposes;

(b) Made by the delivery of a negotiable instrument, with an endorsement, if necessary;

(c) Made as part of the sale, or change in the ownership or the legal status, of the business out of which the assigned receivables arose.

2. This Convention does not apply to assignments of receivables arising under or from:

(a) Transactions on a regulated exchange;

(b) Financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;

(c) Bank deposits;

(d) Inter-bank payment systems or inter-bank payment agreements, or investment securities settlement systems;

(e) A letter of credit or independent guarantee;

(f) The sale, loan or holding of, or agreement to repurchase, investment securities.

3. This Convention does not:

(a) Affect whether a property right in real estate confers a right in a receivable related to that real estate or determine the priority of such a right in the receivable with respect to the competing right of an assignee of the receivable;

(b) Make lawful the acquisition of property rights in real estate not permitted under the law of the State where the real estate is situated.

[4. This Convention does not apply to assignments listed in a declaration made under article 39 by the State in which the assignor is located, or with respect to the provisions of this Convention which deal with the rights and obligations of the debtor, by the State in which the debtor is located.]

Chapter II
General provisions

Article 5
Definitions and rules of interpretation

For the purposes of this Convention:

(a) "Original contract" means the contract between the assignor and the debtor from which the assigned receivable arises;

(b) "Existing receivable" means a receivable that arises upon or before the conclusion of the contract of assignment; "future receivable" means a receivable that arises after the conclusion of the contract of assignment;

(c) "Writing" means any form of information that is accessible so as to be usable for subsequent reference. Where this Convention requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person's approval of the information contained in the writing;

(d) "Notification of the assignment" means a communication in writing which reasonably identifies the assigned receivables and the assignee;

(e) "Insolvency administrator" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the assignor's assets or affairs;

(f) "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(g) "Priority" means the right of a party in preference to another party;

(h) A person is located in the State in which it has its place of business. If the assignor or the assignee has places of business in more than one State, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has places of business in more than one State, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person;

(i) "Law" means the law in force in a State other than its rules of private international law;

(j) "Proceeds" means whatever is received in respect of an assigned receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods;

(k) "Financial contract" means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above;

(l) "Netting agreement" means an agreement which provides for one or more of the following:

(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;

(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; and

(iii) The set-off of amounts calculated as contemplated by the preceding subparagraph (i) (ii) under two or more netting agreements.

Article 6
Party autonomy

Subject to article 21, the assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement.

Article 7
Principles of interpretation

1. In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Chapter III
Effects of assignment

Article 8
Form of assignment

An assignment is valid as to form if it meets the form requirements, if any form requirements exist, of either the law of the State in which the assignor is located or any other law applicable by virtue of the rules of private international law.

Article 9
Effectiveness of bulk assignments, assignments of future receivables and partial assignments

1. An assignment of existing or future, one or more, receivables, and parts of, or undivided interests in, receivables is effective as between the assignor and the assignee, as well as against the debtor, whether the receivables are described:

(a) Individually as receivables to which the assignment relates; or

(b) In any other manner, provided that they can, at the time of the assignment or, in the case of future receivables, at the time of the conclusion of the original contract, be identified as receivables to which the assignment relates.

2. Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable.

3. Except as provided in paragraph 1 of this article, article 11 and paragraphs 2 and 3 of article 12, this Convention does not affect any limitations on assignment arising from law.

4. An assignment of a receivable is not ineffective against, and the right of an assignee may not be denied priority with respect to the competing rights of, a person described in subparagraph (a) of article 24, solely because law other than this Convention does not generally recognize an assignment described in paragraph 1 of this article.

Article 10
Time of assignment

Without prejudice to the rights of a person described in subparagraph (a) of article 24, an existing receivable is transferred, and a future receivable is deemed to be transferred, at the time of the conclusion of the contract of assignment, unless the assignor and the assignee have specified a later time.

Article 11
Contractual limitations on assignments

1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables.

2. Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement, but the other party to that agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

3. This article applies only to assignments of receivables:

(a) Arising under an original contract for the supply or lease of [goods], construction or services other than financial services, or for the sale or lease of real estate;

(b) Arising under an original contract for the sale, lease or licence of industrial or other intellectual property or other information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

Article 12
Transfer of security rights

1. A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer this right and any proceeds to the assignee.

2. A right securing payment of the assigned receivable is transferred under paragraph 1 of this article notwithstanding an agreement between the assignor and the debtor or other person granting the right, limiting in any way the assignor's right to assign the receivable or the right securing payment of the assigned receivable.

3. Nothing in this article affects any obligation or liability of the assignor for breach of an agreement under paragraph 2 of this article, but the other party to that agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

4. Paragraphs 2 and 3 of this article apply only to assignments of receivables:

(a) Arising under an original contract for the supply or lease of [goods], construction or services other than financial services, or for the sale or lease of real estate;

(b) Arising under an original contract for the sale, lease or licence of industrial or other intellectual property or other information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

5. The transfer of a possessory property right under paragraph 1 of this article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.

6. Paragraph 1 of this article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any rights securing payment of the assigned receivable.

Chapter IV
Rights, obligations and defences

Section I
Assignor and assignee

Article 13
Rights and obligations of the assignor and the assignee

1. The rights and obligations of the assignor and the assignee as between them arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.

2. The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices which they have established between themselves.

3. In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, to have implicitly made applicable to the assignment a usage that in international trade is widely known to, and regularly observed by, parties to the particular practice.

Article 14
Representations of the assignor

1. Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of the conclusion of the contract of assignment that:

(a) The assignor has the right to assign the receivable;

(b) The assignor has not previously assigned the receivable to another assignee; and

(c) The debtor does not and will not have any defences or rights of set-off.

2. Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the financial ability to pay.

Article 15
Right to notify the debtor

1. Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor a notification of the assignment and a payment instruction, but after notification is sent only the assignee may send a payment instruction.

2. A notification of the assignment or payment instruction sent in breach of any agreement referred to in paragraph 1 of this article is not ineffective for the purposes of article 19 by reason of such breach. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

Article 16
Right to payment

1. As between the assignor and the assignee, unless otherwise agreed, and whether or not a notification of the assignment has been sent:

(a) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;

(b) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and is also entitled to goods returned to the assignor in respect of the assigned receivable; and

(c) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and is also entitled to goods returned to such person in respect of the assigned receivable.

2. The assignee may not retain more than the value of its right in the receivable.

Section II
Debtor

Article 17
Principle of debtor protection

1. Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.

2. A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not:

(a) Change the currency of payment specified in the original contract; or

(b) Change the State specified in the original contract, in which payment is to be made, to a State other than that in which the debtor is located.

Appendix

Renumbering of articles of the draft Convention

Current article number (annex I to the present document)	*Former article number (A/CN.9/466, annex I)*
1	1
2	2
3	3
4	4
5	6
6	7
7	8
8	New article
9	9
10	10
11	11
12	12
13	13
14	14
15	15
16	16
17	17

Annex II

List of documents before the Commission at its thirty-third session

Symbol	*Title or description*
A/CN.9/464	Provisional agenda, annotations thereto and scheduling of meetings of the thirty-third session
A/CN.9/465	Report of the Working Group on Electronic Commerce on the work of its thirty-fifth session
A/CN.9/466	Report of the Working Group on International Contract Practices on the work of its thirty-first session
A/CN.9/467	Report of the Working Group on Electronic Commerce on the work of its thirty-sixth session
A/CN.9/468	Report of the Working Group on Arbitration on the work of its thirty-second session
A/CN.9/469	Report of the Working Group on Insolvency Law on the work of its twenty-second session
A/CN.9/470	Receivables financing: analytical commentary of the draft Convention on Assignment [in Receivables Financing] [of Receivables in International Trade]
A/CN.9/471	Report of the Secretary-General on privately financed infrastructure projects: draft chapters of a legislative guide on privately financed infrastructure projects
A/CN.9/471/Add.1	Introduction and background information on privately financed infrastructure projects
A/CN.9/471/Add.2	Chapter I. General legislative and institutional framework
A/CN.9/471/Add.3	Chapter II. Project risks and government support
A/CN.9/471/Add.4	Chapter III. Selection of the concessionaire
A/CN.9/471/Add.5	Chapter IV. Construction and operation of infrastructure
A/CN.9/471/Add.6	Chapter V. Duration, extension and termination of the project agreement
A/CN.9/471/Add.7	Chapter VI. Settlement of disputes
A/CN.9/471/Add.8	Chapter VII. Other relevant areas of law
A/CN.9/471/Add.9	Consolidated legislative recommendations

Symbol	*Title or description*
A/CN.9/472 and Add.1-4	Draft Convention on Assignment [in Receivables Financing][of Receivables in International Trade]: compilation of comments by Governments and international organizations
A/CN.9/473	Note by the Secretariat on training and technical assistance
A/CN.9/474	Note by the Secretariat on the status of conventions and model laws
A/CN.9/475	Report of the Secretary-General on security interests: current activities and possible future work
A/CN.9/476	Report of the Secretary-General on transport law: possible future work
A/CN.9/477	Report of the Secretary-General on International Standby Practices (ISP98)
A/CN.9/478	Report of the Secretary-General on Uniform Rules for Contract Bonds (URCB)
A/CN.9/479	Report of the Secretary-General on ICC Incoterms 2000
A/CN.9/480	[*Not issued.*]
A/CN.9/481	Note by the Secretariat: bibliography of recent writings related to the work of UNCITRAL

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